THE LAW OF COVENANTS.

A Treatise, *explaining the* Nature *and* Rules *of the ſeveral Sorts of Covenants: As,*

Expreſs.	Affirmative.
In Law.	Negative.
Disjunctive.	Mutual, or
Copulative.	Reciprocal.
Joint.	Perſonal.
Several.	Real.
Inherent.	Diſtinct.
Collateral.	Tantamount.

AND ALSO,

The Conſtruction of ſeveral ſpecial Covenants; as, to ſave Harmleſs, Building Covenants, Marriage Covenants, *&c.* The Manner of Declaring and Aſſigning the Breaches; and Pleadings under each proper Title.

WITH

Several other *Matters* relating to *Covenants* and *Bonds* of Performance.

By the Author of The Law of Ejectments.

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THE

PREFACE.

SINCE the flouriſhing and trading Part of our Nation hath in this laſt Century ſo much encreaſed, by Reaſon whereof the Art of conveying and drawing Deeds and Inſtruments hath been exceedingly improved; it is not to be wonder'd that Conſtruction of Covenants, and Actions, and Pleadings, relating to that Title, bear ſo great a Figure in our Books of Reports: If we reflect on the Variety of Aſſurances, Contracts, Bargains, ſpecial Leaſes, Mortgages and Aſſignments, Marriage-

Articles and Settlements, Deeds of Truſt, Charterparties, and the like; to the regular Drawing and apt Forming whereof, proper Covenants are reſpectively neceſſary; we have good Reaſon to conceive, that a Treatiſe of this Nature may be very uſeful and acceptable, it never having been done before in ſuch an entire Manner, or with ſuch exact Method.

I have ſet forth the true Nature and diſtinct Notion of Covenant, as where it is a Condition and not a Covenant, and *e contra*; and where it's in Nature of a Defeaſance, where a Leaſe and not a Covenant, and where a Covenant amounts to a Leaſe: What Words will make a Covenant in Law, and the Extent and Operation thereof: And where a Recital ſhall amount to a Covenant

venant or not: And where a *Proviſo* ſounds in Covenant, or is only a bare Condition.

I have alſo added ſeveral Rules, for Conſtructions of Covenants in reference to the Forms of Words and Sentences, together with the ſeveral Sorts of Covenants; as Affirmative and Negative, Joint and Several, Real and Perſonal, and Reciprocal Covenants; or where they are as a Condition Precedent. And what Covenants ſhall be ſaid to be diſtinct or not.

I have likewiſe treated of ſpecial and particular Covenants, ſuch as to ſave Harmleſs, ſeiſed in Fee, Authority to ſell, *&c.* and to make Payments, for quiet Enjoyment, to permit or ſuffer, to free from Incumbrances, for further Aſſurance, and the like; il-

luſtrated with Variety of Modern Caſes, with the Manner of Declaring and Pleading, rightly applied under each Title.

In the next Place, I have treated of Actions of Covenants; where Debt or Covenant lies at Election; who ſhall have the Action, and againſt whom it is properly to be brought; of Joinder in Action, and where the Action of Covenant ſhall be laid. I have alſo largely treated of Covenants brought by or againſt Aſſignees, and how and by what Covenants they are bound, or not; and what ſhall be a good Bar in Covenant; and what ſhall be ſaid a good Performance of Covenant, and the nice Pleadings thereon; amongſt ſeveral other Titles. Laſtly, Of Bonds of Performance, and the accurate

curate Diverſity between Actions brought on Covenants, and Actions brought on Bonds of Performance of Covenants.

It is confeſſed, ſome of the Caſes are repeated, but that was in ſome Meaſure unavoidable: Firſt, becauſe our latter Caſes are more correct than the former like Caſes, and in ſome, the Matter heretofore taken to be Law, is denied or altered; but chiefly for that many Caſes are divided into ſeveral Branches or reſolved Points, and ſuch reſolved Points are as ſeveral diſtinct Caſes, which ought to be referred under the proper Titles, otherwiſe the Treatiſe had been imperfect.

It's a ſingular Advantage, for the Underſtanding of the Law, to gain a good, tho' ſecret, Method;

for in Law, as in all other Arts and Sciences wisely handled, there is a secret Chain of Coherence, and one Part depends upon another, and facilitates the Construction of the whole, otherwise they are but meer Rhapsodies, and confused Jumbles.

THE

THE CONTENTS.

CHAP. I.

THE Nature of Covenant; where it is quaſi *a Defeaſance, and not a Covenant. Of a Covenant terminating in it ſelf. Covenant in Nature of a Condition Precedent. Covenant and not Warranty, Warranty and not Covenant. Covenant and not Caſe, Caſe and not Covenant. Covenant or Debt at Election. Covenant and not an Exception. Covenant and a Grant alſo. Where not a Covenant nor a Condition, but a Declaration Explanatory. Leaſe or Rent, and not a Covenant in ſeveral Caſes. Covenant and not a* Solvendum. *Covenant and not Account.* From Page 1, to 12.

CHAP. II.

What Words will create an expreſs Covenant or not, [that the Leſſee ſhall repair,] if it be a Covenant. The Conſtruction of the Words [Provided and agreed,] where it is not a Covenant on the Part of the Leſſor, but a Qualification of the Covenant of the Leſſee. How and where Words

Words of Agreement make a Covenant. Where by Words in the future Tenſe, it ſometimes ſounds in Covenant, and ſometimes in Contract. Dedi, demiſi, conceſſi, *Yielding and paying,* &c. *if ſuch Words or Expreſſions amount to a Covenant. Where and in what Caſes Recital ſhall amount to a Covenant or not.* From Page 12, to 19.

CHAP. III.

What Words amount to a Covenant and not to a Condition, or to a Condition and not to a Covenant. What Words amount to a Covenant and not to a Condition, and where to a Condition and not to a Covenant, in ſeveral good Caſes. Covenant on the Part of the Leſſor, and not a Condition. What ſhall be a Covenant in a firſt Leaſe, and a Condition in a ſecond Leaſe. Where a Proviſo *abridgeth a Covenant.* [Provided,] *where it amounts to a Condition or to a Covenant, in ſeveral excellent Caſes. Where it ſhall be conſtrued a bare Covenant and no Intereſt. A Condition, tho' the Words ſound in Covenant.* From Page 19, to 30.

CHAP. IV.

What ſhall be ſaid an Agreement, and what Agreement amounts to a Covenant. In Agreements, where Earneſt ſhall be intended as Part of the Sum, or not. Agreement of the Leſſee, and Covenant of the Leſſor. What Words of Covenant or Agreement ſhall amount to a Leaſe, and what ſhall be a Covenant only. Agreement between Strangers not to amount to a Leaſe. From Page 30, to 36.

CHAP

The CONTENTS.

CHAP. V.

Of Covenants in Law, and what Words create the ſame, and the Operation and Effect thereof. [Demiſit, vendidit, aſſignavit, & tranſtulit,] *how they do create a Covenant, and how not.* [Conceſſit.] *A Covenant in Law ought to be fixed on an Eſtate. No Covenant in Law upon Eviction of Goods. If Aſſignee ſhall have a Writ of Covenant on the Words* [*Demiſe, and Grant.*] *A Covenant in Law doth not extend to make a Man do more than he can.* From Page 36, to 41.

CHAP. VI.

Conſtructions.

Where and in what Caſes expreſs Covenant qualifies the general, or what Aſſignee ſhall have Action on Covenant in Law. Expreſs Covenant controuls an implied Covenant, and ſo a Warranty, and why. Where a remote Agreement at the End of a Deed qualifies the former Part. [*Any Thing to be done by the Leſſor.*] *If Nonfeaſance be an Act.* [Periculis & caſualitibus Maris acceptis,] *to what it extends, or not. Covenant to repair, extends to Houſes after built. Leaſe of a Stock of Sheep, and the old ones die, and new are put in the Room, in whom the Property is. Covenant to leave in as good Plight, how conſtrued. Diverſity between Enjoyment during the Term, and during the Term of Twenty Years. Where an Act done, tho' afterwards diſſolved or reverſed by Law, ſaves the Performance of a Covenant. Where a Covenant extends further than the*

Words.

Words. Of a Declaration variant from the Covenant. Where the Words [*It ſhall be Lawful to carry away*] *transfer a Property. Covenant to make a Leaſe of all his Land in* Dale, *and he hath Copyhold Land there, how to be conſtrued. Covenant, if the Plaintiff marry his Daughter, to pay him* 20 l. per Annum, *and ſaith not how long; how to be conſtrued. Diverſity between Affirmative and Negative Words. The Conſtruction of this Clauſe,* [*If any Strife ariſe, to be ſubmitted to Arbitrators.*] *Diverſity between Words in the Affirmative and in the Negative, as to Conſtruction. Covenant in a Leaſe, That the Leſſee ſhall make Eſtates for Life or Years; how to be conſtrued. Of Conſtructions according to Intent. Covenant to leave the Timber on the Land; how to be conſtrued. Covenant not to aſſign a Thing in Action. Covenant, That he ſhall not hurt nor moleſt the Covenantee; to what it extends. To pay all Taxes in Biſhops Leaſes. In Covenant, one ſhall be ſuppoſed to do what properly belongs to him, in ſeveral Inſtances. Where a Misfeaſance to avoid ones own Grant may amount to a Breach of Covenant;* aliter, *in Caſe of Non-feaſance. When a Man is bound to do or permit a Thing, he ought to do or permit all which depend for the Performance. Covenants, how to be performed in convenient Time. Of Requeſt to perform.* [*At all Times,*] *how to be expounded. Conſtruction of ſeveral Words, Sentences, and relative Clauſes, in Covenants.* [*Being reaſonably required.*] [*During the Term.*] [*During the Time.*] [*Payments.*] [*Ballaſt.*] [*Suffer.*] [*But that.*] [*Then next following.*] [*Charges.*] [*Extunc.*] [*At all Times.*] [*Month.*] &c. From Page 41, to 62.

CHAP.

CHAP. VII.

The ſeveral Sorts of Covenants. Diverſity between Covenants Declaratory, and Covenants Obligatory. Diverſity between Covenants in an Indenture, and in a Deed-Poll; or who may be ſaid to be ſuch Parties as to be charged with them, or to take Advantage of them. Of Covenants Disjunctive, and of Election. Of Covenants Affirmative and Negative, with their Conſtructions. Diverſity between a Negative Covenant, which is only in Affirmance of an Affirmative Covenant and a Negative, which is additional to an Affirmative. A Negative Covenant may inwrap many Particulars. When a Negative Covenant ſhall be ſaid to be performed. Of Covenants Disjunctive. From Page 62, to 73.

CHAP. VIII.

Of Mutual and Reciprocal Covenants. Where it's not a Condition Precedent, but a Reciprocal Covenant; for which, Remedy muſt be by Action. Breach of one Covenant, where not to be pleaded in Bar of another. Negative Covenant of the one Part, and Affirmative Covenant of the other Part; if it be in Conſideratione Performationis inde, *whether the Affirmative Covenant ought to be performed, tho' the Negative is broken. In mutual Promiſes, if the Defendant need to aver Performance.* Non performavit agreeamentum ſuum *generally, without ſhewing a particular Breach, where good. On Breach of mutual Covenants, each Party hath Remedy, illuſtrated in many good Caſes. Tenant to have convenient Timber for Reparations, by the Appointment*

ment of the Bayliff. Conſtruction. 1 Lut. *Sir J.* Talbot's *Caſe.* From Page 73, to 90.

CHAP. IX.

When Covenants ſhall be ſaid to be diſtinct, or not. [Notwithſtanding any Act or Thing by him done to the contrary,] to what Covenant it ſhall extend. Whether the Words [But that] make a a new Covenant or Matter. Diſtinct Covenants, one no Bar to the other. Covenant, that he is ſeiſed in Fee, &c. *had Authority to ſell,* &c. *Whether they are ſeveral or diſtinct. Where a later Covenant reſtrains a former. In what Caſes a Covenant may be ſaid to be new, and not to depend upon a former. In diſtinct Covenants, one no Bar of the other.* From Page 90, to 99.

CHAP. X.

Of Covenants Joint or Several. Covenants Joint and Several, and by what Words. Where a Joint Intereſt makes a Joint Covenant. Covenant with them, Et quolibet eorum. *Diverſity, where the Words* [Et quolibet eorum] *make the Covenant ſeveral, or not. Where joint Words ſhall be taken ſeverally. Covenant for Three, jointly and ſeverally to pay; if Action be brought againſt one, and the Breach is, he did not pay, if it need to be averred, not any of the others paid it.* Vide *Joinder in Action.* From 99, to 105.

CHAP

CHAP. XI.

Covenants Perſonal, Real. Their reſpective Natures. Covenants Inherent or Collateral. What ſhall be accounted Real Covenants that run with the Land, or ſhall affect the Aſſets only. On a Real Covenant, Remedy but by Four Ways. Who ſhall have Benefit of ſuch Covenants as run with the Land. Where the Heir ſhall have the Covenant, not the Executor. Of what Covenants the Aſſignee ſhall have Benefit. Of what Covenants Tenants by Statute or Elegit ſhall have Advantage. From Page 105, to 108.

CHAP. XII.

Covenants concerning Payment of Money. Covenant to pay 10 s. *when* A. *comes to his Houſe, and* 10 s. *at the Feaſt of St.* Michael *the Archangel, and the Feaſt of St.* Andrew *then next following, how to be conſtrued. Conſtruction of Covenants for Payment of Money, within* 40 *Days next after a Ship ſhall make her firſt Retorn and Arrival in a Voyage from* N. *into the Port of* Dartmouth, *or to any other Port where ſhe ſhall unlade her Goods, whether the Money ſhall be paid within* 40 *Days after the Arrival, or after the unlading of the Goods. To deliver,* &c. *on the* 27*th Day of* Febr. *next, how to be conſtrued. Of Acceptance before the Day. Of Payment amongſt Merchants. Place of Payment.* From Page 108, to 111.

CHAP.

CHAP. XIII.

Several Special Covenants. Covenant to save harmless. Covenant not broken by an unlawful Distress. Covenant to save harmless of all Things contained in an Indenture, if it shall extend to Bonds of Covenants. Covenant for quiet Enjoyment, and saving harmless, if both must be answered, and the Pleading in such Case. Where the Defendant ought to shew how he saved harmless. Debito modo Execut', *where good Pleading or not. Covenant to Build, unless he be restrained by Proclamation. Covenant to build an House,* juxta regulas prescriptas, *in the Statute* 19 Car. 2. c. . *Covenant to build an House by a Day, and the Covenantor forbids him. Covenant to pay Money on Procurement of a Pardon. Covenant to permit.* Permisit, or non permisit, *where a good Plea. Covenant, That he would suffer him and his Assigns to have Ingress. Covenant, That the Plaintiff shall have and enjoy a Salary, it binds not to pay the Money due, but only restrains from intermeddling; it's said,* quod non permiserunt, *but no special Disturbance. Covenant not to alien or assign. Not to alien but to Wife or Children. Where, though there was Alienation by Licence, yet that Assignee cannot alien without Licence. Where Administrator is bound by such Covenant. Where Covenant that the Lessee shall not alien, where it's a Condition and a Covenant. Covenant to render Possession at the End of the Term. Covenant to pay all Taxes.* From Page 111, to 124.

The CONTENTS.

CHAP. XIV.

Covenants upon Marriage Agreements. Conſtruction of the Words [20 l. per Annum]. *Covenant to pay Money at the Day of Marriage, whether Notice muſt be given. Where Covenant not to be performed till the Day of Marriage. Covenant to give* 20 French *Pieces towards a Wedding Dinner, what Pieces ſhall be intended. To give as much with his Daughter S. as with any other Child. Covenant to pay for the Wedding Apparel. Covenant to pay* 300 l. *within* 3 *Months after he ſhall come to* 18 *Years of Age, or within* 18 *Days of the Marriage, after Notice. Notice muſt be given of both.* From Page 124, to 128.

CHAP. XV.

Covenants as to Payment of Rents. Covenant to be brought upon a Deed in nature of a Covenant. Leſſee aſſigns his Term, and the Leſſor his Reverſion. Reverſioner *accepts the Rent of the Aſſignee, if he may have Covenant againſt the Firſt Leſſee. Rent paid before the Day, no Performance of the Covenant. Expreſs Covenant to pay Rent at ſeveral Days, Covenant will lie before all the Days are paſs'd. Not Debt. During the Term to what it extends. How to declare in Covenant for Rent, in ſeveral good Caſes. Who to do the Firſt Act by Demand.* From Page 128, to 135.

CHAP. XVI.

Pleadings to Actions of Covenant, for Rent and Yearly Payments. Releaſe of the Leſſor after the Aſſignment of the Reverſion. No Act of the Leſſee can diſcharge him or his Executors of a ſpecial Covenant to pay Rent. Defendant pleads, Nihil habet in Tenementis. *Where Demand of Rent muſt be pleaded or not. Levied by Diſtreſs pleaded. Entry and Expulſion pleaded.* Nil debet *pleaded. Of the Plea,* Nil habet in Tenementis. *Plea, That no Rent is behind. Plea, That he paid it at the Feaſt. On Bond to perform Covenants, where Demand of Rent need not to be alledged. Aſſignment and Acceptance pleaded.* From Page 135, to 148.

CHAP. XVII.

Covenant for Payment of Rent, where to be tried. Damages. From Page 148, to 154.

CHAP. XVIII.

Covenant for Reparations: Page 150, 154.

Leaſe commencing in Point of Intereſt, or in Point of Computation. Pavement, if it be within the Word [*Building*]. *Convenient, Tenantable and Neceſſary Reparations, what. Where Covenants for Reparation are mutual. To leave it well repaired at the End of the Term. The particular Breach not anſwered. Pleads, That it was ſufficiently repaired before the Action brought. Concord pleaded. Covenant to repair after Notice. Defendant pleads, That the Houſe was burnt down by Negligence. Covenant*

want to repair after Notice. Diſcharge of all Reparations pleaded. In fine Termini, & ad finem Termini, *the Difference. Covenant to build, unleſs reſtrained by Proclamation.* Non Infregit Conventionem *pleaded, when the Breach is in* non Reparando. *Covenant for Reparation, where to be tried.* From Page 154, to 170.

CHAP. XIX.

Covenant, That he had good Power and lawful Authority. From Page 170, to 172.

CHAP. XX.

Covenant for quiet Enjoyment. Eviction or Diſturbance, how to be pleaded. Eigne Title. *Pleads Performance of Covenants,* Ex parte ſua per implend'; *Diſturbance of him, or any other Perſon by or through his Means, Title or Procurement, how conſtrued.* 40 l. *accepted in Satisfaction pleaded.* [*For any Thing done by them*] *how extends. Diverſity between during the Term, and during the Term of ſo many Years.* Habere fac' poſſeſſion' debito modo exeun'. *By Covenant broken before the Condition broken, the Obligation forfeited. Covenant to ſave harmleſs from Eviction, in a Leaſe dated long before the Delivery, ſhall extend to Eviction before the Delivery. Covenant for quiet Enjoyment, notwithſtanding any Act done by him, how to be conſtrued. What amounts to Eviction, Interruption or Diſturbance, or not. How the Word* [*defend*] *ſhall be taken.* [*Suffer*], *how far it extends. Claiming Title, a Stranger enters,*

and it's not ſaid, habens Titulum. *Covenant againſt* V. *and all claiming under him: One claims under him by Act of Parliament made after the Covenant. Where an Exception is an Agreement.* [*Them*], *where not to be taken jointly. Covenant to ſave harmleſs againſt a Perſon certain.* From Page 172, to 190.

CHAP. XXI.

Prior Aſſignment no Breach till Entry. Where if a Stranger enters by Tort, it is a Breach, or not. Diſturbance by K. *not ſhewing what Title* K. *had. No Title ſet forth in the Diſturber, yet good after a Verdict. Declaration not good, becauſe he ſets not forth the Diſturber had any Right. Where a tortious Diſturbance ſhall be a Breach of a Condition, and where not. Covenant not to moleſt. What Moleſtation ſhall be intended. Declaration on Diſturbance by Procurement. Good Title at the Time of the Covenant by Fine, which afterwards an Act of Parliament declares the Fine to be void, yet the Covenant is broken.* Habens legale Jus *pleaded. The Words* [*performing Covenants, and paying Rents*], *it's no Condition.* Quod non potuit habere & gaudere, *without ſhewing how. Suit on quiet Enjoyment, after the Determination of a Term, a good Breach, if well aſſigned. Covenant to give Security on Procurement of an Office to pay ſo much Yearly. Security need not be given till Deputation made. Liberty of* ingreſſ', egreſſ', & regreſſ', *to and from a Well of Water, and Pleadings on it.* From Page 190, to 209.

CHAP.

CHAP. XXII.

Covenant to make Aſſurance: To ſuch Perſon as the Covenantee ſhall name. If one covenant to ſurrender a Copyhold Eſtate, it muſt be an effectual Surrender. What is not a reaſonable Aſſurance. Of Time to adviſe. Covenant to make a Feoffment, he muſt make Livery. How Acres ſhall be accounted. Where a Bargain and Sale enrolled doth not make a ſufficient Eſtate. In Covenant to make Aſſurance, who to do the Firſt Act. Covenant to make further Aſſurance. Where the Execution of the Conveyance ought to precede the Payment of the Money. Payment, ſecundum formam & effectum Articulorum, *pleaded. The Learning of Declaration, and Averment of mutual Promiſes. Covenant to make further Aſſurance on Requeſt. At all Times hereafter, within the Space of One Month, when he ſhall he ſhall be required, how to be conſtrued. Requeſt ought to be made to the Perſon. Covenant to levy a Fine. Covenant to make Aſſurance, as Councel ſhall adviſe. Diverſity between Aſſurance and reaſonable Aſſurance. Obligation not any Aſſurance. Whoſe Councel to give the Advice. Of the Plea,* Concilium non dedit Adviſamentum. *By Advice of* J. D. *if* J. D. *adviſe an inſufficient Security, it's a Diſcharge of the Covenant. Uſual Covenants may be put in. Deed-Poll not any Aſſurance of Rent. A Releaſe with Warranty, no Aſſurance. Aſſurance, at whoſe Coſts. Aſſurance to be made by Parcels, if required. If any Covenants be unreaſonable, to be ſhewed on the other ſide.* From Page 209, to 236.

CHAP. XXIII.

Covenant to levy a Fine upon further Assurance. Who to sue out the Writ of Covenant. Note of a Fine offered, but no Costs. Diversity to make reasonable Assurance, and a special Covenant to acknowledge a Fine. The Words [*and also*], *where makes Two distinct Sentences. The Performance of Acts on Record ought to be shewed specially. In Disjunctive Covenants he ought to shew which of them performed.* From Page 236, to 241.

CHAP. XXIV.

Covenant to account. Defendant pleads he was robbed, and so could give no Account. The Place of Account not shewed. Covenant lies on a Writing, by which the Defendant covenants to be accountable for 100 l. *Covenant, That the Plaintiff shall receive the Salary, how to be construed. To account Monthly on Request, and the Request was the Day after the Month. He made an Account of all the Rents, but saith not what Sums. To give account of all such Monies as should come to his Hands; Plea, That he had laid out* 800 l. *in Reparations, and saith not he had accounted.* From Page 241, to 248.

CHAP. XXV.

Covenant that the Land shall be of such a Value. Entry and taking the Profits, a Breach of this Covenant. Covenant that the Lands conveyed to the Wife are of the yearly Value of, &c. *and so*

ſo ſhall continue, notwithſtanding any Act done by him. The Conſtruction of it. Where the Covenant for the yearly Value an abſolute and diſtinct Covenant. Covenant to make an Eſtate of ſuch Lands as ſhould deſcend to him from his Grandfather, the ſame Lands to be of the clear yearly Value, and more Lands deſcended that amounted to a greater Value, how it was taken. Covenant to pay Taxes on Biſhops Leaſes. Covenant to pay all Charges, Dues and Duties, to be paid for or by Reaſon of the Land; after a Tax is granted by Parliament, which ſaith, the Leſſors ſhall be charged for their Rent to the ſaid Tax. (Q. If this Act of Parliament diſchargeth the Covenants, p. 251. 25. Hales *not* Rolls contra.) From Page 248. to 254.

CHAP. XXVI.

Requeſt, to what preceding Clauſes it ſhall relate, or not. Where it's not neceſſary in Covenant to alledge a Demand. Covenant to convey according to the Draughts agreed, &c. *he need not tender Wax, for he hath taken it upon him to do it. When Tender of a Conveyanse is requiſite or not.* From Page 254, to 258.

CHAP. XXVII.

Covenant that he is ſeiſed in Fee.

That he was ſeiſed in Fee, without Conditions. Covenant, that he is ſeiſed in Fee, according to the Indenture by which he purchaſed the Covenant, is abſolute. Breach may be aſſigned as general as the Covenant is. Covenant that he hath Power to ſell. Covenant that the Leaſe is a good Leaſe. On a Leaſe by Tenant in Tail, and not warranted by Statute. From Page 258, to 262.

CHAP. XXVIII.

Precedent of a Covenant in a Feoffment, that he was Owner, and ſeiſed of an indefeaſible Eſtate, &c. Notice; Where one is to take it at his Peril. General Notice, as upon a Proclamation in Court, where ſufficient. Where Notice not neceſſary. From Page 262, to 270.

CHAP. XXIX.

Covenants concerning Copyhold Eſtates. Covenant to ſurrender, it muſt be an abſolute and effectual Surrender. By Covenant to make a Surrender upon Requeſt, not bound to make a Letter of Attorney. Agreement to ſurrender Copyhold Land to the Uſe of A. *If Surrender into the Hands of Two Copyholders, according to the Cuſtom, be a good Performance. Covenant to aſſure Copyhold Land. Covenantor ought to procure a Court to be held.* From Page 270, to 273.

CHAP. XXX.

How and in what Caſes Infant ſhall be bound by his Covenant, or not. How and for what Neceſſaries Infant ſhall be bound, for Learning is binding, for Dancing not, for buying Materials to maintain his Trade not, yet for Neceſſaries for his Houſhold ſhall bind him. Whether the Particulars of the Neceſſaries need to be ſet forth. Infant and another of full Age covenant one againſt the other, the Covenant of him who is of full Age ſhall bind him. From Page 273, to 276.

CHAP. XXXI.

Covenant to free from Incumbrances. Doubt whether one be Owner of the Term in general, or a Term to him aſſigned. Where Premiſſes extend to Land and Term. Where if Acquittal extend to the Land, or to the Perſon, he muſt ſhew how. Rent-ſeck expreſly within the Word Rents. Covenant to Diſcharge, where it goes to the Land, where to the Poſſeſſion. Breach as to not ſaving harmleſs, and ſhews not Diſturbance by Title or Tort. Difference where the Covenant is general, and where ſpecial, as to ſaving harmleſs. Where Covenant not broken by Aſſignment. From Page 276, to 283.

CHAP. XXXII.

Covenant that he had lawful Right and Title to let: The Breach, that he had not Right or lawful Eſtate to let, it's well aſſigned, and it lies not in the Plaintiff's Notice, who had the rightful Eſtate; but the Defendant muſt maintain he was ſeiſed in Fee, and had a good Eſtate, and then the Plaintiff muſt ſhew a ſpecial Title in ſome other. Bargainor covenants that he is ſeiſed of a good Eſtate, &c. *in Fee, and that he had good Authority to ſell, and that there is not any Reverſion in the Crown by any Act made by him; the laſt Words refer only to the laſt Clauſe. A general Requeſt to convey, how expounded. Reaſonable Aſſurance, what.* From Page 283, to 286.

CHAP.

CHAP. XXXIII.

Covenants relating to Apprentices. By what Covenants they are bound, tho' under Age. Covenant to inſtruct by the Maſter, if diſcharged by Death. Diſcharge at Seſſions pleaded. Where Breach may be aſſigned as general as the Covenant. Covenant againſt Apprentice. Cuſtom of Lands pleaded, if it be a Departure. Proof of Imbezelment, when and how to be made. Collateral Covenants not to bind an Infant. From Page 286, to 292.

CHAP. XXXIV.

Actions.

Action, how often on Breach of a Covenant. One grants Rent to another, and covenant to pay it. If Grantee recover in Action of Covenant for Non-payment, it's a good Bar againſt another Action for the Rent. Where the Heir ſhall have Action of Covenant. Who ſhall have Action of Covenant, or not. One that is not Party, tho' he ſeal. One, tho' he never did ſeal the Deed. One Action of Covenant upon Two Reverſions. By Baron on a Leaſe to the Wife. Where on Agreement Debt lies as well as Covenant. Oyer, Monſtre des faits. *In what Caſes one cannot have Action of Covenant, not being Party to the Deed. In ſome Caſes a Stranger to the Covenant ſhall maintain Action againſt the Covenantor. When the Action ſhall be brought. On ſeveral Payments. In what ſpecial Caſes Covenant lies. Good againſt the Party himſelf, reſerving Rent to a Stranger. Lies on a* Conceſſit *in a Fine of a Term againſt a Feme Covert. No Action of Debt, becauſe it ſounds in Covenant. Where Remedy muſt be by Way of*

Covenant, and not by Plea. Of a Thing to be done at the Time of the Covenant, and after prohibited by a Statute. [Dimiſſa, Præmiſſa,] *If thoſe extend to the Uſe of a Pump. In what Caſes Covenant doth not lie. Covenant not broken, becauſe out of the Words.* From Page 292, to 308.

CHAP. XXXV.

Covenant, againſt whom. Againſt Feme Covert. Againſt Leſſee of the King, tho' no Counterpart. Againſt a Corporation. In what Caſes he that accepts the Eſtate, tho' he ſeal not, ſhall be bound by the Covenants. Covenant *againſt the Heir. Baron and Feme covenant not to commit Waſte; Baron dies, no Action lies againſt her. But for what Things it lies againſt her,* Vid. Fine ſur conceſſit *by Baron and Feme.* From Page 308, to 311.

CHAP. XXXVI.

Joinder in Action. Severally on ſeveral Intereſts. Tenants in Common, where muſt join in Covenant. Covenant with Three, & quolibet eorum. *Where the Survivor ought to have the Covenant, and not he to whom the Money is to be paid. One that never ſealed the Deed joins in Action of Covenant. Joinder in Action, becauſe of a joint Stock and a joint Trade. Judgment againſt one by Default, and Bar by Plea againſt the other. He is barred as to both, and why.* From Page 311, to 316.

CHAP.

The CONTENTS.

CHAP. XXXVII.

Where the Action of Covenant ſhall be laid or brought. A ſpecial local Breach. Diverſity between Covenant for Rent, and Debt for Rent, as to the Viſne. Stat. 32 H. 8. c. 34. *explained. Enquiry of Damages where the Deed is made.* From Page 316, to 319.

CHAP. XXXVIII.

Who ſhall have Covenant by Corporation brought by Executors, tho' not named. On Leaſe by Eſtoppel, or not. By Heirs, and where to bring the Action. By Baron and Feme. Where by the Executors, and where by the Heir. Where the Heir ſhall take Advantage of a Covenant. Where Arrears of Penalties go to the Executors, and future to the Heir. Covenant to deliver to the Teſtator upon Requeſt, yet Executor ſhall requeſt and have Action for the Refuſal. Where Heir ſhall have the Action and not the Executor. Surviving Covenantee to bring the Action, tho' he has no Benefit. By the Executor of a Succeſſor Biſhop on a Covenant in a Leaſe made by the Predeceſſor Biſhop. Covenant againſt Executors, tho' not named. Againſt the Heir. Where Heir ſhall have the Action. Executor, how to plead. Defendant pleads Aſſignment before Rent Arrear. Covenant that the Executors of A. *ſhall pay to* B. 20 l. *not naming himſelf, no Covenant lies. Covenant to teach an Apprentice his Trade, binds the Executors.* From Page 319, to 333.

CHAP.

CHAP. XXXIX.

Covenant againſt Aſſignees. How chargeable. Covenant for Rent againſt the firſt Leſſee. Where againſt the Aſſignee or Leſſee at Election. Againſt Leſſee after the Aſſignment of the Term, by Grantee of the Reverſion. Act of the Leſſee ſhall not divide the Action of the Leſſor. Covenant to renew a Term. Stat. 32 H. 8. *explained. Baron and Feme grant the Reverſion, Grantee brings Covenant as Aſſignee of the Husband only. Where Aſſignee need not ſhew any Deed of Aſſignment. Aſſignee of a Term, where ſhall have Remedy upon a Covenant by Way of Retainer. Under-Tenants, who. In what Caſes the Aſſignee ſhall be bound, tho' not named. Aſſignee not bound, when the Covenant extends to a Thing that had not Eſſence at the Time of the Demiſe made. Covenants by a Perſonal Contract bind not the Aſſignee.* From Page 333 to 369.

CHAP. XL.

Declaration. Et ſic infregit conventionem, *Where there is Breach of Three Covenants. Sum miſcaſt. In Covenant the Declaration was in Action on the Caſe,* quod cum, *&c. yet good. Diverſity between a Bond and a Covenant aſſigning a Breach. Where Notice to be laid, or not.* Monſtre des faits. *Oyer. Miſentry amended upon Oyer.* Quarternatim, *how it ſhall be intended. Covenant and demands more than is due, and the Jury gives leſſer. Declares* adhuc, *&c. which refers to a Time after the Original, yet good.* Teſtatum exiſtit, *where good or not.* Per Scriptum, *and ſaith not* Sigillo Sigillat. Licet,

Licet, *and ſaith not* Tamen. *Leaſe alledged only by Way of Recitement.* In quadam Indentura, *but it is not indented. Covenant to find Meat and other Neceſſaries, and ſhews not what they are. Indenture miſtaken as to Parties. That the Defendant is indebted, as appears; but ſhews not how.* Poſtea & ſcilicet *Repugnant. Variance between the Deed and the Declaration.* From Page 369, to 387.

CHAP. XLI.

Breaches as to Suits in Law. Outlawry pleaded in Bar. Breaches by Suits and Decrees in Chancery. Debito modo, *where ill in Pleading. Where Marriage is a Countermand of Suits. Where a Suit after Determination of a Term is a Breach of Covenant. Of Breaches by Diſability. Where Breach muſt be aſſigned according to the Words of the Covenant. Where Breach may be well aſſigned, tho' not directly within the Words. Breach aſſigned within the Intent. Breach aſſigned as general as the Covenant. In what Caſes an Endeavour ſhall be eſteemed a Breach or Forfeiture, tho' it take not full Effect. Deviſe to a Stranger againſt his Covenant, and the Executor aſſents not. Plaintiff may aſſign as many Breaches as he will in Action of Covenant. The Plaintiff ſhall have Judgment for them that are well aſſigned.* Et ſic, *a ſufficient Averment of a Breach. Where a Breach not well aſſigned by a* Clamans Titulum. *In mutual Promiſes, need not ſhew a particular Breach. Breach aſſigned according to the Words, or not. Breach of Covenants in Time after the Action brought, is ill. For a Penalty, a Man can aſſign but one Breach. Breach by Conſtruction. A Covenant in the ſame Indenture,*

Indenture, pleaded in Bar of the reſt. Where it ſufficeth to aſſign the Breach as general as the Covenant is. Where a good Breach may be aſſigned, though not directly within the Words. Where the Judgment ſhall ſtand as a further Security, to anſwer Damages for a further Breach. From Page 387, to 413.

CHAP. XLII.

Pleadings. Nil debet. *Where it muſt be ſhewed what Eſtate or Right he who entred into the Land at the Time of his Entry. Covenant in the ſame Deed pleadable in Debt for Rent, and why. In Covenant with a* Proviſo, *the Declaration good without Recital of the* Proviſo. *Pleading Notice.* Warrantia Charta, *no Plea in Covenant. Pleadings of Covenant in the Disjunctive. Requeſt where traverſable. Concord pleaded in ſeveral good Caſes. Where the Want of a Breach is ſupplied by* Non eſt factum. *Entry of the Leſſor pleaded, not good to a Covenant to build an Houſe. Where Remedy, not by Plea, but by Action of Covenant. Of pleading Affirmative and Negative Covenants. Negative Pregnant. Plea good, purſuant to the Words of the Covenant, being in the Negative. Iſſues informal. Iſſues immaterial. Leſſor grants the Reverſion, and after releaſeth Covenants to Leſſee before the Breach.* Debito modo, *where ill in Pleading.* From Page 413, to 431.

CHAP. XLIII.

Eſtoppels. From Page 431, to 435.

CHAP.

CHAP. XLIV.

What Releaſes ſhall be a good Bar of Covenants, or not. Though Covenants broken be releaſed, yet the Bond remains under Forfeiture. Future Covenants, where not releaſed by the Marriage of the Covenantor and Covenantee. Covenant to do a Thing to a Stranger, releaſed. Releaſe, where it extends not to the whole Covenant. Covenant, That he will not ſue before ſuch a Day, no Suſpenſion of the Debt, nor a Releaſe. Releaſe of Obligatoria ſcripta, *to what it extends. Releaſe not to diſcharge a Duty created by it.* From Page 435, to 443.

CHAP. XLV.

Where to be tried. At the Place where the Incumbrance was made. Venue *not changeable in Covenant. Local Trial. Iſſue on Two Negatives. Iſſue Argumentative and Informal.* Monſtre des faits. *Covenant founded upon a Writing made in* London. *Miſtrial aided per Statute* 16, 17 Car. 2. c. 8. *Covenant for not repairing, to be tried where the Houſe lies. A Breach aſſigned in a Foreign Kingdom. Damages given for more than ought. Breach aſſigned in Two Covenants, and for one he had no Cauſe of Action, and for the other he had a good Cauſe, and entire Damages, ill. From what Time the Grantee of the Reverſion ſhall recover Damages. Covenants againſt Two, and Judgment by Default againſt one, the other pleads the Performance, and found* pro *Defendant: Plaintiff ſhall not have Judgment againſt the other.* From Page 443, to 456.

CHAP.

CHAP. XLVI.

What ſhall be ſaid a good Performance of a Covenant or not. Performance in Subſtance. Covenant to withdraw a Suit: Diſcontinuance is no Performance. Where Deed of Bargain is not a good Performance. An Act covenanted to be done, and is done, though afterwards diſſolved or reverſed by Law-Suit. Of a Rent-Charge executed by the Statute of Uſes. Leſſee pays the Rent before the Day, no Performance. From Page 456, to 461.

CHAP. XLVII.

Performance. Within what Time, or upon Requeſt; or where a Man ſhall have Time, during his Life, to perform it. Where the bringing the Action is a Requeſt. What particular Covenants to be performed in Time convenient. The Conſtruction of the Words [at all Times.] Reaſonable Time to perform it after Demand. When a local Act to be done. When a Man covenants to do a Thing upon Requeſt, what Requeſt it muſt be. From Page 461, to 464.

CHAP. XLVIII.

Covenants void at Law, being againſt Law. Buying of Offices. Void by Non-reſidence. On Uſurious Contract. Covenant to do a Malum in ſe, *or a* Malum prohibitum. *Covenant to levy a Fine, or ſuffer a Common Recovery. Covenants impoſſible.* From Page 464, to 470.

CHAP. XLIX.

What will extinguish, ſuſpend or diſcharge a Covenant. Diſcharge of Part a Diſcharge of the Reſidue. By ceaſing of the Eſtate. Covenant, where extinct. Covenantee forbids the Covenantor to perform his Covenant. What ſhall excuſe the Performance of a Covenant; Act of God. Covenant to build an Houſe, and the Plague is there. If the Land be recovered, the Covenant to yield up is diſcharged. Diverſity where the Law creates a Duty; and where the Party by his own Contract makes a Duty. By Acts of him that is to have the Advantage. Where Interruption ſhall excuſe. Where the Abſence of the Covenantee ſhall excuſe the Performance. In Covenant to give Account of Money, Excuſe that he was robbed. A Thing lawful to be done at the Time of the Covenant, afterwards prohibited by Act of Parliament. What meant by convenient, tenantable and neceſſary Reparations. From Page 470, to 481.

CHAP. L.

Covenants determining with the Eſtate. Leſſee ſeals his Part, and not the Leſſor, Quid operatur. *Diverſity, where a Deed is void in its Fabrick, and where there is only want of Intereſt in the Grantor. Of Obligation to perform Covenants on a void Grant.* Proviſo, *If he doth not pay ſuch Money at ſuch Feaſts, the Indenture to be void, Action lies for Covenant broken before the Indenture is void.* Statute 14 Eliz. *explained. Upon Eviction, if Covenant lies, though the Leaſe be originally void.*

void. A Suit after the Determination of the Term, in what Cases it is a Breach of Covenant. From Page 481, to 491.

CHAP. LI.

Bonds of Covenants. Of Covenants to be performed under a Specialty. Several curious Diversities between Actions brought on the Covenant, and on Bonds for Performance of Covenants. Bonds to perform Covenants extends not to a Proviso *in a Mortgage, there being no Covenant to pay the Money. Parole Contract may be pleaded in Discharge of Damages in Covenant, not so on Obligation for Performance. In Covenant a Man may assign as many Breaches as he will, not so on Bond of Performance. Where the Lease is void, the Bond of Covenants is void also.* Monstre des faits. *Defendant pleads Covenants performed generally, without shewing the Indenture, it's demurrable to, and why. If the Party who would plead the Deed have it not, how he shall come by a Copy. Diversity between Obligation to perform Covenants, and to pay Money. Bonds to perform Covenants, if assignable to the King for a Debt. If some of the Covenants are void at Common Law, whether the Bond shall stand good for the rest. How if some are void by Statute-Law.* From Page 491, to 501.

CHAP. LII.

Where the Covenants are in the Affirmative or Negative, or Disjunctive. Where Performance must be shewn particularly. Bar pursuant to the Count. Diversity, where the Act ought to be done by the Party, and where by a

Stranger. Diverſity between an Act to be done, and a Permittance in pleading Permiſit. *What the Bond for Performance of Covenants eſtops, and what not. What is confeſſed by pleading Covenants performed. Bonds, with Conditions to perform Covenants generally, and what ſhall amount to a Breach or not. Entry into the Land excepted, no Breach of the Condition. The Words to perform all the Agreements,* Contenta, Expreſſa, aut Recitata, *how far they extend. Breach aſſigned after the Action brought, ill. Where, if the Subſtance of the Covenant be alledged, it may ſuffice. Cauſe of Action muſt appear.* From Page 501, to 512.

A TREA-

A TREATISE OF Covenants, &c.

CHAP. I.

The Nature of Covenant.

COvenant, in the Terms of the Law, is defined to be the Agreement or Conſent of Two or more by Deed in Writing, ſealed and delivered; whereby either of the ſaid Parties doth Promiſe to the other, That ſomething is done already, or ſhall be done hereafter. Now a Covenant is not a Duty, nor Cauſe of Action till it be broken, and therefore it is not diſcharged by a Releaſe of all Actions: And when it is broken, the Action is not meerly founded on the Specialty, as if it were a Duty, but favours of Treſpaſs; and therefore

an Accord is a good Plea to it, and it lies in Damages. *Allen* 38, 39. in *Eeles* and *Lambert's* Caſe.

A Covenant properly is a Specialty, but by Cuſtom *Conventio ore tenus facta*, is binding in *Briſtol*, in *Wade* and *Bemboe's* Caſe. *Bemboe*, Plaintiff, declared in *Briſtol* of a Covenant made by Word by the Teſtator of the Defendant with the Plaintiff in *Briſtol*, and declared alſo within the ſaid City: There is a Cuſtom, that *Conventio ore tenus facta* ſhall bind the Covenantor as ſtrongly as if it were made in Writing. *Per Cur'*, this Cuſtom doth not warrant this Action, for the Covenant binds the Covenantor by Cuſtom, but doth not extend to his Executors, but ſhall be taken ſtrictly. 1 *Leon.* 2.

Cuſtom of *Briſtol, Conventio ore tenus facta.*

To be taken ſtrictly.

Where a Covenant terminates in it ſelf, it is not properly a Covenant, but a Defeaſance. *Plo.* 138. *a.* As a Covenant that the Demiſe ſhall be void, it ſhall determine the Leaſe, and it cannot enure to other Effect, for the Leſſee cannot have an Action of Covenant upon this Covenant, for ſuch Action does not lie; but where the Thing for which the Covenant is made, is to be done in Time after, *Raym.* 26. But in Action of Covenant, in nature of a Defeaſance of a Recognizance, that upon Payment the Recognizance ſhall be delivered up to be vacated, and cauſed to be cancelled by the Defendant. This Covenant doth not terminate in it ſelf, but is for a Collateral Act, and engageth the Party to ſuch Act; and not only that it ſhould be void. 1 *Keb.* 103, 118. 1 *Syd.* 48.

Defeaſance, and not a Covenant.

Where a Covenant terminates in it ſelf, or to a preſent Act, no Covenant properly.

A Covenant to do a preſent Act is not properly a Covenant, as a Covenant to ſtand ſeiz'd. *Raym.* 26. 1 *Syd.* 48. It is no Action properly, but Action on the Caſe. When

When a Covenant is to pay Money, it is a ſingle Bill; but if it be to pay Money upon the Delivery of any Thing, Accord is a good Plea. 1 *Keb.* 155. *in Margine.*

Sometimes a Covenant is in Nature of a Condition Precedent, as *Brocas*'s Caſe. 3 *Leon.* 219. Where the Lord of a Manor covenanted to aſſure the Freehold to one of his Copyholders, and to his Heirs; and the Copyholder, in Conſideration of the ſame Covenant performed, promiſeth to pay a certain Sum of Money: The Copyholder is not bound to pay the Money, unleſs the Lord firſt perform his Covenant; otherwiſe if the Covenant, on the Part of the Copyholder, had been in Conſideration of the Covenant to be performed. 2 *Sand.* 156. Cited in *Hunlock* and *Blacklow*'s Caſe.

Covenant in nature of a Condition Precedent.

Covenant and not Warranty, or Warranty and not Covenant.

A Feoffment by *Dedi & conceſſi*, in Action againſt the Feoffor, does not warrant Action of Covenant on Eviction of the Inheritance, but it muſt be deduced in the real Lien by Warranty; but in caſe of a Freehold only, it is a Ground for Covenant. 1 *K.* 821. So *Prans* Caſe. But in *Yelv.* 139. *Hob.* 3. If a Man makes a Deed by Feoffment with Warranty, and an Eſtranger extends a Recognizance of the Feoffor on the Lands of the Feoffee, Covenant lies.

Per Coke Ch. Juſtice, in *Daniel* and *Waters*'s Caſe. *Brownlow* 165. Upon expreſs real Covenants, which extend to Freehold or Inheritance, as Warrant and Defend; a Man cannot have Action, unleſs he be ouſted by one

Difference between a Leaſe and an Inheritance, as to Words of Warranty.

one that hath Title. And a Man makes a Feoffment with Warranty, *non Feoffavit* is a good Plea; for if the Feoffment be avoided, the Warranty is alſo avoided, for that depends upon the Feoffment. But if a Man makes a Leaſe for Years, and covenants that he will warrant and defend the Land to the Leſſee; if the Leſſee be ouſted by one that hath Title or without Title, he may have an Action of Covenant, for the Leſſor hath the Evidences, and ought to defend the Poſſeſſion of his Leſſee, and the Right alſo, and Damages are only to be recovered: And this is the Difference between a Leaſe and Inheritance, though the Words of the Covenant be all one.

Covenant and not Caſe, Caſe and not Covenant.

A. recovers Debt againſt *B.* and *B.* pays the Money to *A.* upon which *A.* releaſeth all Actions and Executions to *B.* and by the ſame Deed promiſeth to him to diſcharge the ſaid Judgment, and not to ſue Execution upon it, and after he ſues Execution againſt him, he may have a Writ of Covenant upon this Deed, and not an Action on the Caſe. *M.* 16 *Jac. B. R. Reiniſh* and *Hilderſly.* Where the Words are Words of Defeaſance, and in the Preſent Tenſe, and a preſent Thing to be done, Covenant lies not, but an Action on the Caſe. 1 *Syd.* 48. *Robinſon* and *Aunt's* Caſe.

In *B. R. C. J. Hales.* The Caſe was, *A.* covenants in a Leaſe, that *B.* ſhall have free Ingreſs, Egreſs and Regreſs, Way and Paſſage to and for himſelf, his Executors, Adminiſtrators and Aſſigns, and all Perſons reſorting there-

thereto from a Meſſuage, &c. to a Meſſuage, &c. and *A.* gives *B.* a Key to the Door which was in the Paſſage; it was rul'd upon a Trial that the Door muſt be left open, although it was uſed ſo to be ſhut at the Time of the Grant: The Covenant was not well Penn'd, it ſhould have been at Times ſeaſonable and convenient. This was in Action on the Caſe; and the Queſtion was, If Action on the Caſe lies here, or rather Covenant? *Per Hale*, If an Intereſt paſs (as in this Caſe it ſeems to do) and the Covenantor himſelf diſturbs, Action on the Caſe lies.

Covenant and Debt.

If a Man covenant with another to pay him 20 *l.* at a Day, though he may have Action of Debt for the 20 *l.* yet he may have an Action of Covenant at his Election. *Mic.* 7 *Jac. Strong* and *Wells.*

If *A.* grant a Rent to *B.* payable at a certain Feaſt Yearly, and covenants to pay the Rent at the Feaſt, Action of Coſt lies for Non-payment, although he may have an Action of Debt for it. *Vid. Ibid.*

If *A.* acknowledge by his Deed to have ſold to *B.* Ten Cords of Hop-Poles for 14 *s.* *per* Cord, which he is to deliver to *B.* at his Garden, when *B.* ſhall ſend his Servant to Cord them. Qu. If a Man may have Action of Debt in the *Detinet*, to render Ten Cords of Hop-Poles upon this Deed, or be put to his Action of Covenant? 1 *Rol. Abr.* 606. *Coachman* and *Horden.*

If in a Deed ſealed and delivered by *A.* it be recited, Whereas by Obligation of ſuch a Date that *B. C. D.* and *E.* ſtood bound in

the Penal Sum of 160 *l.* to the ſaid *A.* for the Payment of 86 *l.* 18 *s.* at a certain Day; now this Writing teſtifies, That he, *viz.* the ſaid *A. ſuſcepiſſet & promiſiſſet* to the ſaid *B. C. D.* and *E.* in Conſideration of the Sum of 40 *l.* to the ſaid *A.* paid by the ſaid *B.* and *C.* in Part of the ſaid 86 *l.* 18 *s.* with Intereſt and Coſts, not to proſecute the ſaid *B. C. D.* and *E.* or any of them, in any Action or Proceſs before ſuch a Day, after the Date of this Writing, *Omnia quæ ſupra mentionata ſunt per ipſum performata, & in defection' inde vel alicujus rei inde mentionatæ per ipſum performari idem* A. *forisfaceret al' dit'* B. *&* C. *præd. ſummam* 80 *l.* If *A.* before the Day ſue the ſaid *B. C. D.* and *E.* upon the ſaid recited Obligation, *B.* and *C.* only may have Action of Debt on this laſt Writing for the 80 *l.* for this is a diſtinct Clauſe by it ſelf, by which the ſaid 80 *l.* is limited to be forfeited to *B.* and *C.* only: So that it appears the Recompence ſhall be forfeited to them only, although the Promiſe by the firſt Part of the Deed was made to all Four; upon which they might have Action of Covenant, but none beſide *B.* and *C.* may have Action of Debt. 1 *Rol. Abr.* 592. *Harriſon* and *Cheſton.*

Covenant or Debt, by whom.

F. N. B. Debt lies on any Covenant where the Sum is reducible to a Certainty. 2 *Keb.* 225. *Birch* and *Weaver.*

It's agreed, That Debt lieth on any Covenant where the Sum is reducible to a Certainty, as on Covenant to pay ſo much a Hundred for Hops delivered. 1 *Keb.* 225. *Birch* and *Weaver.*

Cove-

Covenant, and not an Exception.

Leaſe for Years by Indenture, provided always, and it is agreed between the Parties, *Quod licitum foret & eſſet*, to the Leſſor and his Heirs, at any and every Time, during the Term, to fell, cut down, and ſell, all the Woods and Trees upon the Premiſſes. *Per Cur'*, It is not an Exception of the Trees, but only a Covenant; and ſo an Action of Waſte lies by the Plaintiff. *Cr. El.* 690. *Luſhford* and *Sanders's* Caſe.

Covenant and a Grant alſo.

Bond conditioned for Performance of Articles, by which the Defendant *conceſſit & agreeavit* with the Plaintiff, his Heirs and Aſſigns, *Quod licitum foret illis* at all Times to have and uſe a Way by and over the Cloſe of the Defendant, in Conſideration whereof, the Plaintiff *agreeavit* to pay the Defendant 20 *s.* 6 *d. per Annum.* This is a Grant of a Way, and not only a Covenant for the Enjoyment. 3 *Levins* 305. *Holmes* and *Sellar.*

Not a Covenant nor a Condition, but a Declaration Explanatory.

Leaſe of a Farm except the Wood, Leſſor covenanted with the Leſſee that he ſhall take all manner of Underwood, provided always, and the Leſſee covenants he will not cut any manner of Timber Trees: This adjudged no Condition, but an Explanation with what Wood he ſhould meddle, though in Truth it was of another Thing than was comprized in the Covenant before; as if I am ſeized of the Manor of *D.* in *D.* and

of Black-Acre in *D.* and ſo ſeized. I covenant with *J. S.* that he ſhall enjoy the Manor for Ten Years, provided and the ſaid *J. S.* covenants that he ſhall not enjoy Black-Acre. This Covenant is not a Condition, but a Declaration deduced out of my Covenant, to make a plain Declaration that it is not my Intereſt that Black-Acre ſhall paſs, be it Parcel or not of the ſaid Manor. *Pop.* 117 & 119.

Covenant quaſi *a Defeaſance.*

Debt on ſingle Bill of 68 *l.* with Covenant to pay it when ſuch Bills be ſtated, and appear due for the Coſts of the Defendant Teſtator, and produced to Two Attorneys, *&c.* indifferently to be choſen between them, *&c.* the Covenant being in the ſame Deed, it works as a Defeaſance or Acquittance, not as a diſtinct Deed, *&c.* 1 *Keb.* 624. *Holdy* and *Otway.*

Leaſe or Rent, and not a Covenant.

If *A.* lets Land to *B.* by Indenture, and the Words are, *in Conſideration of the Payment of the Rent hereafter mentioned,* he leaſeth, *&c.* and after, in the ſame Indenture, *B.* covenants for him and his Aſſigns with *A.* and his Aſſigns, to pay 10 *l.* at certain Feaſts Yearly, *&c.* This ſhall be a Rent, and not a Sum in groſs, for upon the whole Indenture, this ſhall be a Reſervation, and not a Covenant; for the Words [*in Conſideration of the Rent hereafter mentioned*] make it clear. 2 *Rol. Ab.* 449. *Athowe* and *Heming.*

Reſervation, and not a Covenant.

By

By Articles the Teſtator covenants and agrees with the Defendant that he ſhall have and enjoy ſuch an Houſe and Land for 6 Years, and in *conſideratione Premiſſorum* the Defendant covenants and agrees to pay to the Teſtator, his Heirs, Executors and Aſſigns, an Annual Rent of 90 *l.* during the ſaid 6 Years, at the Feaſt of the Annunciation, and St. *Michael.* Defendant enters, Teſtator dies, Rent is arrear, if it be a Covenant it is due to the Executor, if it be a Reſervation it follows the Reverſion, and ſo goes to the Heir. *Per Cur'*, This is meerly a Rent, and not a Covenant, and the Words [*covenant and grant that he ſhall enjoy*] amount to a Leaſe, and is not a Sum in groſs, and he covenants to pay to him and his Heirs. *Cro. Car.* 207. *Drake* and *Monday*, & *Owen* 151. *Alſo* and *Dennis*'s Caſe.

Rent and Reſervation, and not a Covenant.

2 *Bulſt.* 281.

A Prior leaſeth a Rectory, rendering 4 *l. per Annum*, and by the ſame Indenture grants to the Leſſee and his Aſſigns, *dare & reddere*, Yearly 3 *s.* 4 *d.* for Portage, the Rent reſerved is 4 *l.* and though 3 *s.* 4 *d.* is to be paid to the Leſſee for Portage, yet this is not any part of the principal Rent to be retained by way of Defalcation, and by way of Covenant the Leſſee is to receive 3 *s.* 4 *d. Yelv.* 42. *Chambers* and *Maſon*'s Caſe.

Covenant, and not a Rent.

Thomas Seley, ſeized of Copyhold Lands for Life, did execute a Deed to *Peter Seley*, as a collateral Security to indemnify him for the Payment of 100 *l.* by which Deed, after a Recital of the Counterbond given to *Peter*, and the Eſtate which *Thomas Seley* had in the Lands, he did covenant, grant and agree for himſelf, his Executors, Adminiſtrators and Aſſigns, with the ſaid *P.* that he, his Executors and Adminiſtrators, ſhould hold

theſe

Leaſe, and not a Covenant.

theſe Lands from the Time of making the ſaid Deed for 7 Years, and ſo from the End of 7 Years to 7 Years, for and during the Term of 49 Years, if *Thomas* ſhould ſo long live. The Court ſeemed inclined that it's a Leaſe, and ſo a Forfeiture, there being no Cuſtom to warrant it. It is a Rule, *That the Word* [*Covenant*] *will make a Leaſe, though the Word* [*Grant*] *be omitted*; nay, a Licence to hold Land for a Time without either of theſe Words, will amount to a Leaſe, much more when the Words are, To have, hold and enjoy, the Lands for a Term certain: As *Hob.* 35. *Tiſdale* and *Eſſex.* 2 *Cro.* 92, 398. 1 *Rol. Abr.* 847. *Cro. Car.* 207. And it is now ſettled, that an Action of Debt may be brought upon ſuch a Covenant; but it was ſmartly argued on the other Side. If the conſtruing of it to be a Leaſe will work a Wrong, then it's only a Covenant and an Agreement, and no Intereſt will veſt; and therefore it ſhall not be intended a Leaſe in this Caſe of a Copyhold, for if it ſhould, there would be a Wrong done to the Leſſor and Leſſee; for it would be a Forfeiture of the Eſtate in the one, and a defeating of the Security of the other; but no Judgment was given. 2 *Mod.* 80. *Richards* and *Seley.* 3 *Keb.* 638. *Meſme* Caſe.

Rent, and not a Sum in groſs.

Articles of Agreement indented and ſealed between *A.* and *B.* the Words are, *It is covenanted and agreed, That* A. *doth lett ſuch Land to* B. *for* 5 *Years from* Michaelmas *next, provided* that the Leſſee ſhall pay therefore at *Michaelmas* and *Lady-Day* 100 *l.* by equal Portions; in as much as the firſt Words are a preſent Leaſe, the Proviſo ſhall make a preſent Reſervation of the Recovery, and not a Sum in groſs. 2 *Rol. Abr.* 449. *Vide plus infra.*

Cove-

Covenant, and not a Solvendum.

Plaintiff brings Debt on Bond againſt the Defendant, wherein the Defendant did acknowledge himſelf to be indebted to the Plaintiff in 40 *l.* which he did thereby covenant to pay, when ſuch a Bill of Coſts ſhould be ſtated by Two Attorneys indifferently to be choſen between them; and ſets forth in his Declaration, That he named one Attorney, and deſired the Defendant to name another, which he refuſeth to do, and ſo intitles himſelf to the Action. *Per Cur'*, This is a Covenant, and not a *Solvendum*, for elſe it will be in the Defendant's Power never to pay the Money, and the Plaintiff, having named an Attorney, ought to Recover. 2 *Mod.* 266. Sir *J. Otway* and *Holdipps.*

Covenant, and not Account.

Covenant upon a Writing ſealed, by which the Defendant's Teſtator acknowledgeth himſelf to be accountable to the Plaintiff for all ſuch Moneys which ſhall be charged by him upon *A.* to be paid to *B.* and ſaith he charged ſo much upon *A.* to be paid to *B.* and that he had not paid it; wherefore he brought this Action againſt the Defendant, his Executors: *Per Cur'*, Covenant well lies upon ſuch Words in a Deed, though, 1 *Cr. Geary* and *Raiſon* was cited to the contrary. *Covenant will lie upon any Words in a Deed, purporting an Agreement for Payment of Money.* 1 *Levins* 47. *Brice verſus Carr. Vide* this Caſe, 1 *Keb.* 155. *Et per Cur'*, There is no

Covenant lies upon a Writing, by which the Defendant covenants to be accountable for 100 *l.*

no other Remedy againſt Executors; and had it been againſt the Party himſelf, ſuch Agreement being by one Perſon to pay Money charged upon *J. S.* for which an Account lieth not, he being not chargeable as Receiver or Baily, the only Remedy is by Covenant, and it's not like *Green* and *Reſon*'s Caſe, 1 *Cro.* 128. No Notice is given by the Plaintiff to *Dixen*; who, upon ſuch Bill, was to pay to Sir *Thomas Viner*, which *per Cur.* is not neceſſary. *Vide* 1 *Keb.* 155.

CHAP. II.

What Words will create or amount to an expreſs Covenant, or not.

Yielding and paying.

THE Words, *Yielding and Paying*, makes an expreſs Covenant, and not a Covenant in Law only; as if a Man let Land for Years, reſerving a Rent, Action of Covenant lies for Non-Payment of the Rent, for *reddendo*, the Rent is an Agreement for the Payment of the Rent, which will make a Covenant, 1 *Ventr.* 10. 1 *Rol. Abr.* 519. *Pl.* 10.

The Leſſee ſhall repair.

Theſe Words in an Indenture of Leaſe, [*and the Leſſee ſhall repair the Mills*] being the Thing leaſed, as oft as Need ſhall require, and ſhall leave them ſufficiently repaired at the End of the Term, make a Covenant, for it is the clear Agreement of the Parties, and otherwiſe the Words [ſhall leave, *&c.*] will not have any Effect, and becauſe of the laſt Words it cannot be a Condition, *Brett* and *Cumberland*; and being by Indenture, it

is

is the Words of both Parties. *Pop.* 136. 2 *Cro.* 399.

If Leſſee for Years covenant to repair, *&c.* provided always, and it is agreed, that the Leſſor ſhall find great Timber: This makes a Covenant on the Part of the Leſſor to find great Timber, by the Word [*agreed*,] and ſhall not be a Qualification of the Covenant of the Leſſee: But if the Leſſee covenant to Repair, provided always that the Leſſor ſhall find great Timber without the Word [agreed;] this Proviſo ſhall not be any Covenant on the Part of the Leſſor, but ſhall only be a Qualification of the Covenant of the Leſſee. 1 *Rol. Abr.* 518. *Holder* and *Taylor*'s Caſe. In the Indenture of Apprentice, That Apprentice ſhall be Loyal, *& Secreta ſua velaret*; theſe Words imply a Covenant. *More* 135. *Stanton*'s Caſe. 1 *Levin.* 274. *Raym.* 183.

If there are Articles of Agreement between *A.* and *B.* by which it is agreed (upon a Marriage intended between *A.* and *C.*) that all the Stock of *C.* ſhall remain in the Hands of *B.* until *A.* ſhall make a certain Jointure to *C. ipſo* B. *Annuatim ſolvendo* to A. *intereſſe proinde ſecundum ratam* 8 l. *per Cent. &c.* If *B.* does not pay the ſaid Intereſt, an Action of Covenant lies againſt him upon theſe Words; for that every Agreement by Deed is a Covenant, and otherwiſe *A.* ſhall not have any Remedy for the Money. 8 *Car.* B. R. *Croſs* and *Northey*, 1 *Rol. Abr.* 518. *Pl.* 6.

If a Man convey Land to another in Fee with Warranty, and after the Land is evicted by eigne Title for certain Years, the Grantee of the Land may have Action of Covenant upon the ſaid Words againſt the Grantor upon this Eviction, although the Warranty be an- Covenant or Warranty according as the Eviction is.

annexed to the Freehold, for the ſaid Words make a Covenant if a Chattel be evicted, and a Warranty if a Freehold be demanded. 1 *Rol. Rep.* 25. *Rudg* and *Pruchcomb.*

This Caſe is more intelligibly reported in *Hob.* 3. *Yel.* 139.

It is agreed, that there is no need of the Word Covenant to make a Covenant, *but any Thing under the Hand and Seal of the Parties, which import an Agreement, will amount to a Covenant.* 1 *Rol. Abr.* 518. Theſe Words in a Leaſe for Years, *That the Leſſee ſhall Repair*, make a Covenant. So in the Caſe of Indentures of Apprentiſhip, there are not the formal Words of a Covenant, but only an Agreement, That the Maſter ſhall do this, and the Apprentice ſhall do that; theſe are Covenants, but in all theſe Caſes there is ſomething of an Undertaking. So *Rol.* 519. *Walker's* Caſe. If a Deed be made to another in theſe Words, *viz.* I have a Writing in my Cuſtody, in which *W.* ſtandeth bound to *B.* in 100 *l.* and I will be ready to produce it: This is a Covenant, for this is a preſent engaging to do it.

Words of Agreement make a Covenant.

Words in the Future Tenſe.

A. made a Bill of Debt againſt *B.* for the Payment of 20 *l.* at 4 Days, and in the end of the Deed covenanted and granted with *B.* his Executors and Adminiſtrators, That if he made Default in any of the ſaid Payments, that then he will pay the Reſidue that then ſhall be unpaid; and afterwards *A.* fails in the firſt Payment, and before the ſecond Day *B.* brought Action of Debt for the whole 20 *l.* It was moved, if *B.* will ſue *A.* before the laſt Day, it ought to be by Way of Covenant, and not by Debt. But *per Cur.* the Action lies; for if one covenant to pay me 100 *l.*

at ſuch a Day, Action of Debt lies *a fortiori*, when the Words of the Deed are Covenant and Grant; for the Word Covenant ſometimes ſounds in Covenant, ſometimes in Contract, *ſecundam ſubjectam materiam*. 1 *Leon.* 208.

The Word Covenant ſometimes ſounds in Covenant, ſometimes in Contract.

The Teſtator was indebted to the Plaintiff by Bond, which he did thereby covenant to pay, when ſuch a Bill of Coſts ſhould be ſtated by Two Attorneys indifferently to be choſen between them; and ſets forth in his Declaration, That he named one Attorney, and deſired the Defendant's Executor to name another; which he refuſed, and ſo brings Action of Covenant. This is a Covenant, and not a *Solvend'*; and if it ſhould not be a Covenant, but an entire Bond, then it would be in the Power of the Obligor, whether ever it ſhall be payable; and the Plaintiff, having named an Attorney, ought to recover. 2 *Mod.* 266. Sir *John Otway verſus Holdipps* Executor, *&c.* I am content to give to *W.* 10 *l.* at *Michaelmas*, and 10 *l.* at *Lady-Day*, Action of Covenant lies upon it as well as Debt. 3 *Leon.* 119.

Bond to pay 40 *l.* when an Account ſhall be ſtated, it is a Covenant.

In Covenant on a Feoffment and Grant of Biſhops Lands, Breach was aſſigned, That the Defendant had no good Title, and Demurrer thereon; the Court conceives that this will not make any expreſs Covenant, but *dedi* will, and ſo *reſervando*. 3 *Keb.* 549. *Browning*'s Caſe.

Covenant doth not lie againſt Executors of Tenants in Tail, upon theſe Words, *Demiſe* and *Grant*. 1 *Anderſon*, *p.* 12. Upon the Words [Demiſe and Grant] without any other Words, which comprehend Warranty in them, this Action well lies, and a Leaſe by

Demiſe and Grant.

by Eſtoppel is a good Leaſe to ground this Action upon Eviction; and to traverſe that he was not poſſeſs'd by vertue of a Leaſe, is no Plea againſt the Leaſe by Indenture, which is an Eſtoppel, without ſhewing a particular Cauſe. *Cro. Jac.* 73. *Stiles* and *Hering.*

If the Lord grant to his Tenant, that he will not diſtrain him in ſuch a Part of his Land for his Rent, this ſhall be taken to be a good Covenant, by this Word [Grant.] *Perk. Sect.* 69.

If a Man make a Leaſe for Years, and warrant it to the Leſſee, his Heirs and Aſſigns, though this be not a Warranty, yet it's a good Covenant in Law. *Br. Cov.* 38.

Though the Words *Vendidit aſſignavit & tranſtulit*, does not amount to a Covenant againſt an eigne Title, yet againſt the Covenantor it will amount to a Covenant. 3 *Keb.* 304. *Deering cont' Farrington.*

A Leaſe for Years made to *A.* determinable upon the Lives of *B. C.* and *D. B.* dies, *A.* aſſigns to *E.* and *E.* reciting the Death of *B.* and the Aſſignment to him, aſſigns the Term to *F.* and covenants with him, That he himſelf is lawfully poſſeſs'd of all the Premiſſes of a good and ſufficient Eſtate for the Reſidue of the ſaid Term, if the ſaid *C. D.* or either of them, ſhall happen ſo long to live, and they the ſaid *C.* and *D.* are yet in full Life, though the Words are not, (and that) the ſaid *C.* and *D.* are yet in full Life; yet this is implied by the Words, and is as a ſeveral Covenant, or otherwiſe the laſt Part would be void and of none Effect. The Breach was, That *C.* was dead at the Time of the Aſſignment. 2 *Rol. Abr.* 249. *Pl.* 2.

Where Recital amounts to a Covenant.

Covenant on Demiſe of a Coal-Mine, whereby it's recited, That before ſealing of the Indenture, it was agreed the Plaintiff ſhould have the 3d Part digged, *&c.* On Demurrer to the Declaration it was excepted, That here is no Covenant to pay the 3d Part, but a Recital of an Agreement to have it. But by *Hales*, were it but a Recital, that before the Indenture they were agreed, it is a Covenant; and ſo to ſay, Whereas it was agreed to pay 20 *l.* for now the Indenture it ſelf confirms the Agreement, and Intent Precedent, tho' it be relative to the former Act in *Païs*, when it's declared by Deed, it is now a Covenant by the Indenture. 3 *Keb.* 465. *Barfoot* and *Picard.*

Recital, That it is agreed.

Defendant covenanted by Articles, reciting, That a Marriage was intended between the Defendant and one *Rebecca*, Widow, who had ſeven Sons; the Defendant covenanted in the ſaid Articles, having recited, That *R. M.* deceaſed, Father of the ſaid ſeven Brothers, had by his Will bequeathed, *cuilibet ipſor' præd' Joſeph' Jacob, &c.* (only leaving out *Nathaniel*) the Sum of 50 *l.* a-piece; covenants with the Plaintiff to pay to the ſaid ſeven Sons, naming *Nathaniel, præd' ſeperales Legationes, vel Sum'* 50 *l.* and the Defendant pleads further, he paid to the ſix Sons 50 *l.* a-piece, and ſheweth Performance of the other Articles: Plaintiff demurs, becauſe he ſhews not he paid 50 *l.* to *Nathaniel*, and he did expreſly covenant to pay the ſaid *Nathaniel*, and the reſt, the ſaid ſeveral Legacies or Sums of 50 *l.* *Per Cur'*, in the Recital of the ſaid Will, nothing is mentioned to have been bequeathed to *Nathaniel*

A Covenant that doth not conſiſt with the Recital, that leads and occaſions it, ſhall not oblige, *&c.*

thaniel as well as the reſt, though he covenants to pay to *Nathaniel* as well as the reſt, yet it is *Legationes, ſummas præd'*, and there being no Legacy to *Nathaniel*, and that appearing by the Recital of the Will, his Covenant ſhall not oblige the Defendant to pay him any Thing. 2 *Ventr.* 140. *George* and *Butcher*.

A. by his Deed Poll recited, That he was poſſeſſed of certain Lands for Years of a certain Term, by good and lawful Conveyance he aſſigned the ſame to *J. S.* with divers Covenants, Articles and Agreements, in the ſaid Deed contained, which are or ought to be performed on his Part: The *Qu'* was, If the Recital be an Article or Agreement within the Meaning of the Condition of the Bond for Performance. *Per Gaudy*, it is an Agreement, every Thing contained in the Deed is an Agreement, and not only that which I am bound to perform. It was moved, If that Recital be within theſe Words of the Condition, [*which are or ought to be performed on my Part?*] And ſome were of Opinion, it is not within thoſe Words, for that extends only in *futurum*; but this Recital is of a Thing paſt, or at leaſt preſent. *Clench*; Recital of it ſelf is nothing, but being joined and conſidered with the reſt of the Deed, it is material as here, for againſt this Recital he cannot ſay that he hath not any Thing in the Term, and it was clearly reſolved, That if the Party had not that Intereſt by a good and lawful Conveyance, the Obligation was forfeited. 1 *Leon.* 122. *Severn* and *Clerk*.

Recital being conſidered with the reſt of the Deed, is material.

In

In *Babington* and *Allen*'s Caſe, theſe Words [paying the Rent] is no Condition Precedent, but rather *Concomitant*, and is the Conſideration whereupon the Party is to do the Act, and is liable to Conſtruction as the Subject Matter is, the Word [paying] and without Conſtruction (unleſs as in the Caſe of *Dier* 371. it be Precedent) doth not import a Condition; but clearly here it can be no Condition, being an uſual Clauſe at the End of all Leaſes. 2 *Keb.* 9. 23.

CHAP. III.

What Words amount to a Covenant, and not to a Condition; or to a Condition, and not to a Covenant.

LEſſee brought Covenant, and declared, That the Leſſor covenanted with him, that he paying the Rent, and performing the Covenants on his Part to be performed, ſhall quietly enjoy; the Breach aſſigned was a Diſturbance by the Leſſor. Leſſor pleads, the Plaintiff did enjoy quietly till ſuch a Time; but then he cut Wood down, which was contrary to his Covenant, and then he entered. The *Qu'* was, Whether the Defendant's Covenant was Conditional or not? For if it amount to a Condition, then the Leſſor's Entry is lawful; but if it be a Covenant, he ought to bring his Action. *Per Cur'*, the Covenant is not Conditional, for the Word, *Paying* and *Performing*, ſignify no more than that he ſhall enjoy under the Rents and Covenants. Indeed, the Word

Where the Word Paying amounts to a Condition, and where not.

[Paying] may in ſome Caſes amount to a Condition; but that is, where without ſuch Conſtruction the Party can have no Remedy. 2 *Mod.* 35. *Vaughan* 32. 1 *Sid.* 266, 280.

Leſſor covenants, That the Leſſee, paying his Rent, ſhall enjoy the Land demiſed during the whole Term the Leſſee did not pay the Rent, and after is ejected by a Title Paramount, by Two Judges againſt One: The Covenant is Conditional, and the Leſſee ſhall not have Advantage of it, if he did not perform the Condition which is created by this Word [Paying]. 4 *Leon. p.* 50.

A Man lets Land by Indenture, and in it is ſuch a Clauſe, and it is covenanted (or agreed) between the ſaid Parties, that the Leſſee ſhall not do ſuch a Thing upon Pain of forfeiting his Eſtate. It is a Condition, for the Words being indifferent whether of the Leſſee or Leſſor, they ſhall be taken for the Words of the Leſſor. 1 *Rol. Abr.* 407, 408.

Sir *Thomas Jones. p.* 206. in *Warren* and *Arthur's* Caſe. One covenants that the Plaintiff ſhall quietly enjoy the Land demiſed, paying the Rent reſerved: And there it was pleaded, That the Plaintiff had not paid the Rent according to the Reſervation and Demur upon this; but it was adjudged there, that the Word [*Paying*] doth not make the Covenant Conditional, but that it was a Reciprocal Covenant, for which the Party may have his Action. This Caſe is reported, 2 *Mod.* 34. The Caſe there was, The Breach aſſigned was a Diſturbance by the Leſſor; Defendant pleads, that till ſuch a Time the Plaintiff did quietly enjoy; but that then he cut down Wood, which was contrary to his Covenant, where

whereupon he entered. Now if this Defendant's Covenant amount to a Condition, then his Entry is lawful. *Per Cur'*, It amounts to a Covenant only, and makes not a Condition; nor was it ever known, that by these Words the Lessor entered for Non-payment of Rent.

A Covenant on the Part of the Lessor, and not a Condition.

One made a Lease for Years, Lessor covenanted that the Lessee should have Housebote, Haybote and Plowbote, without committing any Waste, *upon Pain of Forfeiture of the Lease*. The Covenant is no more than what the Law appoints, and therefore vain; and it's a Covenant on the Part of the Lessor, and so cannot be a Condition. *Cro. Eliz.* 604. *Archdeacon versus Jennor.*

Covenants in a first Lease, and Conditions in a second.

A. makes a Lease of Lands to *B.* for 10 Years, rendring Rent, and *B.* covenants to Repair; afterwards *A.* by his Will deviseth, That *B.* shall have the Lands for 30 Years, after the 10 Years, under the like Covenants as are comprised in the Lease: This makes it to be Conditions in the Second Lease what were Covenants in the first, for they cannot be Covenants for want of a Deed; and if they should not be Conditions, the Heir of the Lessor were without Remedy, if they are not performed. *Godb.* 98, 99. 2 *Leon. Pl.* 40. *Owen* 54. *Machele* and *Dunton.*

Where a Covenant is a Condition to defeat the Estate.

Lessee covenants by the same Indenture of Lease, that he will not alien nor assign his Term to any other but to his Wife for Life, and the Residue of the Term to his Children, or one of his youngest Brothers, upon Pain of forfeiture of his Lease; the Lessee assigns it to his Brother, having a Wife. This Covenant is a Condition to defeat the Estate; for being by Indenture, they are the Words of both Parties, and are sufficient to deter-

mine the Leaſe. *Cr. Jac.* 389. *Whichcoat* and *Fox.* 2 *Bulſt.* 290.

Recoverors to an Uſe, before the Statute 27 *H.* 8. make a Leaſe for 99 Years by Indenture, at 10 *l.* Rent; Leſſee by the ſame Indenture covenanted, That he will pay the Rent to *Ceſtuy que Uſe*, his Heirs and Aſſigns, *proviſo ſemper*, if the ſaid *Ceſtuy que Uſe* doth not make his Heir-Male his Aſſignee, that then he ſhall pay the Rent to the Recoverors, their Heirs and Aſſigns; afterwards *Ceſtuy que Uſe* dieth, and doth not make his Heir-Male his Aſſignee, Leſſee doth not pay the Rent to the Recoverors. The Qu' was, If this Eſtate were forfeited, and that this Proviſo makes his Eſtate Conditional? *Per Cur'*, Its no Condition that went to the Eſtate, but only abridged the Covenant. *Cro. Eliz.* 73. *Scot's* Caſe. 2 *Leon.* 128.

Proviſo abridging a Covenant.

In Treſpaſs, Defendant juſtifies, for that *M.* ſeized of Lands let them to the Plaintiff except the Trees and Liberty of Eradicating, *& aſport' cum averiis reparand' ſepes & implend' foveas*, and *M.* grants the Trees and the Liberty to *A* and he and the other Defendants, as his Servants, uſe this Liberty, which is ſpecially pleaded, *que eſt ead' Fractio.* Plaintiff demurs, and for Cauſe ſhews, that the Defendants have not alledged that they have filled the Ditches, and amended the Hedges, according to the Agreement. *Pollexfen* for the Plaintiff ſhewed, that this is a Condition, and not being performed, deſtroys the Agreement, and avoids the Liberty. But *per Cur'*, This is not a Condition, but a Covenant, for which the Leſſee hath Remedy by Action. It was objected, That the Power and Liberty was annexed to the Re-

Covenant, and not a Condition.

Reverſion, which is not granted to *A. ſed non alloc'*, for the Liberty is annexed to the Trees, and incident to them, and aſſignable with them. Sir *Tho. Jones* 205. *Warren* and *After* alias *Arthur*.

A Proviſo, coupled with other Words of Covenant and Grant, ſhall not create a Condition, but be of the ſame Nature as other Words of Grant, as, *Proviſo ſemper*, and the ſaid *A. B.* covenants and grants to and with, *&c.* That the ſaid Earl of *Huntington*, and Lord *Mountjoy*, may dig for Oar. 4 *Leon.* 147. *Moor* 174. Where a Proviſo ſhall not make a Condition.

Debt on Bond, for Performance of Articles; the Plaintiff covenanted with the Defendant to aſſign over his Trade to him, and that he ſhould not endeavour to take away any of his Cuſtomers; and in Conſideration of the Performance of this Covenant, the Defendant covenanted to pay the Plaintiff 60 *l. per Annum* during his Life. Theſe Words, *in Conſideratione Performationis*, make it a Condition Precedent, which muſt be averred. 3 *Leon.* 219. *Per Cur'. præter Twiſden. Twiſden*, How long muſt he ſtay till he be entitled to his Annuity? As long as he lives? For this Covenant may be broken at any Time. *Maledicta expoſitio.* 1 *Mod.* 64. *Humlock* and *Blacklow. Et* 2 *Sand.* 155. 2 *Keeble* 674. *Better* reported by *Sanders.*

Lord *Cromwell's* Caſe, the Words, *covenanted, provided and agreed*, give an Advantage of a Condition, or a Covenant.

Pluis, *where* [*Provided*] *amounts to a Condition, or a Covenant.*

Grant by the Earl of *Pembroke* of the Lieutenancy or Deputyſhip of the Weſt Part of the Forreſt of *Selwood*, to Sir *Maurice Berkley*, and the Heirs Males of his Body: Provided always, and the ſaid Sir *Maurice* covenanted and granted, *&c.* with the ſaid Earl, his, *&c.* That it ſhall be lawful for the ſaid Earl, his Heirs and Aſſigns, to have all the Preeminence and Commandment of the ſaid Game and Hunting there, as if the Grant had not been made. Provided alſo, and the ſaid Sir *Maurice* covenanted for, *&c.* to and with the ſaid Earl, his, *&c.* That the ſaid Sir *Maurice*, and the Heirs Males of this Body, would preſerve the Game as it hath been uſed, and that they ſhould not cut any Wood, *&c.* Sir *Henry Berkley*, Son of Sir *Maurice*, cut down Four Timber Trees. Qu. was, If this were a Condition, and ſo gave Entry to the Earl on a Covenant?

Provided alſo, and it is covenanted, granted, and agreed, where it is a Covenant, and where a Condition.

Per Cur', The firſt Proviſo is not a Condition but a Covenant, either becauſe by this he is not to do more than he may do by his ſuperior Cuſtody, in which Caſe he ought to do it by his own Authority; or if it be taken that he may kill the Game at his Pleaſure, it is void, becauſe againſt his Office.

2. The ſecond Proviſo is but a bare Covenant, it ſhall be entirely the Words of the Grantee himſelf as the Covenant is, and without the Words of the Grantor a Condition cannot be. And therefore, ſuppoſe it had been on the other Part, provided always, and the Grantor covenants that the Grantee ſhall have

Where Proviſo is a bare Covenant, and why.

have the Refuſe of the Browſe, *&c.* This is a meer Covenant, *Poph.* 116. *Earl of Pembroke* ver. *Sir Henry Berkley*, a Caſe there put by *Serjeant Bendlow, was this:*

This Caſe otherwiſe reported by *Moor* 706. and *Cr. Eliz.* 354.

Provided always, and it was covenanted, granted and agreed between the Parties, If the Leſſee ſell or alien the Term, that the Leſſor ſhall have the Preferment. This they agreed to be a good Condition, becauſe they are the Words as well of the Leſſor as of the Leſſee. But the Caſe of *Harrington and Pepull*, 17 *Eliz. B. R. Pepull* made a Leaſe for Years to *Harrington* of a Farm, except the Wood, and covenanted with the Leſſee, that he ſhall take all manner of Underwood. Provided always, and the Leſſee covenants, that he will not cut any manner of Timber-Trees, and it was adjudged no Condition, *Poph. ibid.* 117.

If there are Articles of Agreement made by Indenture between *A.* and *B.* by which *A.* agrees that *B.* ſhall have an Houſe in a Street in *London* for certain Years, provided and upon Condition that *B.* ſhall receive and pay the Rents of the other Houſes in the ſame Street of *A.* mentioned in a Schedule. And it is further agreed, that *B.* for his Labour in collecting the ſaid Rent, ſhall have the Overplus of the Rents beyond ſuch a Sum. This is not any Covenant on the Part of *B.* to bind him to receive and pay the Rents mentioned in the Schedule; but the Proviſo will make the Eſtate of *B.* void in the Houſe (this being a Leaſe, and will not make a Covenant). *M.* 4 *Car.* 1. *B. R. Geary and Reaſon, Cr. Car.* 128. yet ſee 1 *Levinz* 47. *Price* ver. *Carr, & al.*

If

If *A.* make a Deed to *B.* in theſe Words: *I have in my Cuſtody one Writing Obligatory, in which Writing Obligatory one* William *now ſtandeth bound to the ſaid* B. *for the Payment of* 400 l. *ſuch a Day, being the proper Money of* B. *and I will be ready at all Times when I ſhall be required to deliver the ſame Writing Obligatory to the ſaid* B. If *B.* after demands the Obligation of the ſaid *A.* and he refuſeth to deliver it, *B.* may have an Action of Covenant upon this Deed, by force of theſe Words, [and I will be ready at all Times when I ſhall be required to redeliver the ſame,] 11 *Car. B. R. Walker's* Caſe.

[I will be ready at all Times to deliver] amount to a Covenant.

Proviſo, where it makes not a Leaſe, only a Covenant.

If *A.* let to *B.* for Life, with a Proviſo, That if the Leſſee dies within the Term of Forty Years, that then the Executors of the Leſſee ſhall have it for ſo many of the Years which ſhall amount to the Number of Forty Years, to be accounted from the Date of the Indenture of Leaſe. This Proviſo ſhall not make a Leaſe, but only a Covenant, *Dier* 150. 1 *Rep.* 155. *Rector of Chedington's Caſe.*

Covenant, on what Words.

Action of Covenant was brought upon theſe Words, *(viz.) I oblige my ſelf to pay ſo much Money at ſuch a Day, and ſo much at ſuch a Day. Per Cur'*, Action of Covenant lies, eſpecially if both Days are not paſs'd; but the Chief Baron *Bridgeman* doubted, how the Law would have been if the Words were, *Teneri & firmiter obligari*, for that thoſe Words ſound in Debt and not in Covenant. And *per Cur'*, the Words, *quod teneat Conventionem*, and *de Conventione fracta*, are all one, *Hardr.* 178. *Norris's Caſe.*

Where the Word Covenant will make a Leaſe.

It hath been a general Rule, *That the Word Covenant will make a Leaſe, tho' the Word Grant be omitted*; much more when the Words are,

To

To Hold, Enjoy, &c. 2 *Mod. Rep.* 80. But if one covenant to grant and ſuffer one to enjoy ſuch Lands, this will not amount to a Condition, for the Intent of the Parties is only to make it a Covenant.

Biſhop of *Rocheſter* let Lands to the Defendant. Plaintiff replies, That the ſaid Leaſe was upon Condition, *(viz.)* the Leſſee by the Indenture of the ſaid Leaſe did covenant, that he would not put out nor diſturb any of the Tenants inhabiting within the ſaid Mannor out of their Tenements, doing their Duties according to the Cuſtom of the ſaid Mannor, and ſhewed the Defendant had put out one *A. G.* a Tenant, *&c.* and that the Biſhop had reenter'd for the Condition broken. *Per Cur'*, it is a Condition, tho' the Words ſound in Covenant, and be the Words of the Leſſee, yet the Leaſe being made by Indenture, the ſame is the Deed of both, and every Word in it is ſpoken by both Parties; and tho' he may have Action of Covenant, yet he cannot thereby overthrow the Leaſe as by Entry for Condition broken, and yet by the Words it ſeems that the Meaning of the Indenture was, that by the Breach of this Covenant the Eſtate ſhould be defeated. So 24 *Eliz. Hill and Lockham*: By Indenture the Leſſee covenanted to grind all his Corn at the Leſſor's Mill, and in the End of the Indenture Leſſee covenanted to perform all Covenants *ſub pena foris facturæ*, and by the Opinion of the whole Court the ſame was a Condition; but in the principal Caſe the Breach was not well aſſigned. It is ſaid, he had put out a Woman, *unam Tenentem*, &c. and perhaps ſhe was but Tenant at Will, and the Covenant refers only to Copyholders, and perhaps ſhe had

A Condition, tho' the Words ſound in Covenant.

Covenant not to diſturb any Tenant of the Mannor out of their Tenements doing their Duties.

had diſſeiſed one of the Tenants, and then the putting her out is no Breach; it's ſaid ſhe had done her Duty that might be once, he ought to have ſaid ſhe had done her Duty always, and the Exceptions were incurable, 1 *Leon. p.* 245. *Thomas and Ward.*

The Parſon of *D.* covenanted with one of his Pariſhioners, that he ſhould pay no Tythes, for which the Pariſhioner covenanted to pay to the Parſon an Annual Sum of Money, and afterwards the Tythe not being paid, the Parſon ſued him in the Court Chriſtian, and the other prayed a Prohibition. *Per Cur'*, It's a bare Covenant and no Intereſt of the Tythes paſs, but it's a bare Covenant, and the Party who is ſued for Tythes has no Remedy but by Action of Covenant, *Poph.* 140. *Fulcher and Guffin.*

Clapham *and* Moyle's *Caſe.*

On Marriage agreed on between the Defendant and one *Mary J.* 1500 *l.* was to be paid by Articles at ſeveral Days to the Plaintiff, and he to convey ſeveral Lands and an Office to the Defendant, Proviſo that the Defendant out of the firſt Three Years Profits ſhould pay 500 *l.* to the Plaintiff. Plaintiff brings Debt on this Proviſo, averring Profits above the Value received, and that the Marriage took Effect. Defendant demurs, becauſe this Proviſo is in Nature of a Defeaſance or Condition. *Per Cur'*, this Proviſo can never have any Effect as a Condition, *Moyle* was to ſurrender to bring the other in, but could not re-enjoy it on Breach of Condition. There are no Words that refer or direct to any Proviſo to be in the future Grant, nor would the Matter bear it, being an Office of Juſtice, and

Where a Proviſo can have no Effect as a Condition, but is by Way of Agreement.

and therefore could not be reduced on Breach of the Condition; it muſt be conſtrued by Agreement of the Parties to be a Covenant, 1 *Keb.* 842, 860, 892. This Proviſo is not by Way of Defeaſance, but Agreement, 1 *Lev.* 155. *Per tot Cur'*, it amount but to a Covenant by Articles. It is covenanted and agreed between the Parties, that *J. H.* doth let the the ſaid Lands for and during Five Years, to begin, *&c.* Provided always [the ſaid Defendant] ſhall pay to the Plaintiff yearly, at ſuch Feaſt-Days by equal Portions, *&c.* during the Term. And the ſaid Parties agree that a Leaſe ſhall be made purſuant. *Per Cur'*, This is an immediate Leaſe, becauſe of the Words [he doth let.] 2. This Proviſo is a good Reſervation of the Rent, it being by Articles whereunto either of them were Parties: *Per Popham*, it's a Reſervation and a Condition alſo. *Proviſo* joined with the Words of Covenant, make it a Condition and a Covenant alſo, *Cr. Eliz.* 486. *Harrington and Wiſe*, as in *Moo.* 859. *and Noy.* 57. *Meſme Caſe.*

Articles amounting to an immediate Leaſe.

Where *Proviſo* makes a Covenant and a Condition alſo.

If a Man by Indenture lets Lands for Years, provided always, and it is covenanted and agreed between the ſaid Parties, that the Leſſee ſhould not alien, and it was adjuged that this was a Condition by Force of the Proviſo, and a Covenant by Force of the other Words, 1 *Inſt.* 203. *b.*

Action of Covenant on *Conceſſi & Feoffavi*, in a Conveyance of an Inheritance, and Breach aſſigned in Entry on the Plaintiff. Defendant demurs. The Qu. was, Whether *Conceſſi* make a Warranty or Covenant in Caſe of Inheritance, as it doth on a Term? The Court enclined it would not, *Hob.* 3 *Keb.* 188.

CHAP. IV.

What ſhall be ſaid an Agreement, and what Agreement amounts to a Covenant.

IF a Man let a Mannor by Indenture, except a certain Parcel of Land, and the Leſſee enters into Bond to perform all the Covenants, Articles and Agreements contained in the Indenture, and after the Leſſee enters into the Land excepted; yet this is not any Breach of the Condition, for the Land excepted is not leaſed, and is as if it had not been named, and therefore cannot be intended an Agreement to be performed on the Part of the Leſſee within the Intent of the Indenture, 1 *Rolls Abr.* 431. *Ruſſell and Gullnoll.*

Entry into Land excepted, no Breach.

On *Oyer*, the Specialty was, ſſ. 11 *May* 1668. *It is agreed upon by Dr.* J. P. *and* B. C. *Eſq; That the ſaid* B. C. *ſhall give to the ſaid Dr.* 500 l. *for ſuch Land and Houſe, and the Brewing-Veſſels. In Witneſs whereof, we do put our Hands and Seals, mutually given as Earneſt, in Performance of this,* 5 s. *the Money to be paid a Week after Midſummer,* 1668. *Per Cur'*, the Earneſt ſhall be intended as Part of the Sum, and the Action is well brought without Averment of the Conveyance of the Land, for it ſhall be intended that both Parties had ſealed the Specialty, and if the Plaintiff hath not conveyed the Land to the Defendant, he hath alſo an Action of Covenant againſt the Plaintiff upon the Agreement contained in the Deed, which amounts to a Covenant on the Plaintiff's

Earneſt Part of the Sum.

Where Antiquity has a mutual Remedy.

tiff's Part to convey the Land, and ſo each Party hath mutual Remedy againſt the other; otherwiſe if the Specialty had been the Words of the Defendant only, and not the Words of both Parties by Way of Agreement, as here it is; and in the Concluſion it's ſaid, both Parties have ſealed it, 1 *Sand.* 319. *Pordage and Cole* ver. *Caſe*, 1 *Lev.* 274. *& Raym.* 183. 2 *Keb.* 569.

A. by his Deed-Poll recited, That whereas he was poſſeſſed of certain Lands for Years of a certain Term, by good and lawful Conveyance he aſſigned the ſame to *J. S.* with divers Covenants, Articles and Agreements in the ſaid Deed contained, which are or ought to be performed on his Part: The Queſtion was, If this Recital [Whereas he was,] be an Article or Agreement within the Meaning of the Condition of the ſaid Obligation, which was given to perform, *&c.*? *Per Gawdy*, it is an Agreement. For in ſuch Caſe I agree I am poſſeſs'd of it, for every Thing contained in the Deed is an Agreement, and not only that which I am bound to perform; as if I recite by my Deed, that I am poſſeſs'd of ſuch an Intereſt in certain Lands, and aſſign it over by the ſame Deed, and thereby covenant to perform all Agreements in the Deed; if I be not poſſeſs'd of ſuch Intereſt, the Covenant is broken. *Per Clench*, Recital of it ſelf is nothing, but being joined and conſidered with the reſt of the Deed, it is Material, as here, for againſt this Recital he cannot ſay he hath any Thing in the Term. And it was reſolved, that if the Party had not that Intereſt by a good and lawful Conveyance, the Obligation was forfeited, 1 *Leon. p.* 122. *Severn and Clark.* Agree-

Where a Recital amounts to an Agreement.

ment

ment to pay makes a Covenant, 2 *Mod.* 92; 268, 269.

A Condition to perform Covenants and Agreements; one was, That the Plaintiff had covenanted with the Defendant, that it ſhould be lawful for the Defendant to cut down Wood for Fireboot and Hedgeboot, without making Waſte, or cutting more than neceſſary; the Plaintiff aſſigns a Breach in that Covenant (which is in Truth the Plaintiff's Covenant); the Exception was, that the Condition ought but to extend unto Covenants to be performed on the Part of the Leſſee; *ſed non allocat'*. It is the Agreement of the Leſſee, tho' it is the Covenant of the Leſſor, 1 *Leon.* 324. *Stephenſon's Caſe.*

Agreement of the Leſſee, and Covenant of the Leſſor.

It may be the Agreement of the Leſſee, tho' it be the Covenant of the Leſſor, 1 *Leon.* 324. *vid. ſupra.*

What amounts to a Covenant to levy a Fine.

Agreement in Articles with Covenant on the Plaintiff's Side to ſettle a Jointure, and on the other Side to pay 6000 *l.* and it is agreed in the Articles, That a Fine was intended to be levied of ſuch Lands, *&c.* for ſecuring the Payment of the 6000 *l. Per Dom' Cancello' & auters Judges*, this is a Covenant to levy a Fine, 2 *Mod.* 87.

2 *Mod.* 80, 81. *What Words of Covenant or Agreement ſhall amount to a Leaſe, and what ſhall be a Covenant only.* Vide ſupra *Leaſe-Rent, and not a Covenant.*

Covenant to permit one to enjoy, *&c.* is a Covenant and no Leaſe.

If a Man covenant to permit and ſuffer another to have, hold and enjoy certain Lands *a die dat'* for Life, this is a Covenant and no Leaſe, and the Law will not expect any Livery, and for this he ſhall not be Tenant

nant at Will, 1 *Roll. Abr.* 859. *Tooker and Squier.*

Covenant in ſome Caſes ſhall amount to a Grant. As, one covenants *quod Licitum foret* for the Leſſee to take neceſſary Fireboot and Houſeboot to be expended, and for the Reparation of the Premiſſes, *Cr. Jac.* 291. *Purfrey and Grymes.*

Where Covenant ſhall amount to a Grant.

The Words, Covenant and grant that he ſhall enjoy the Lands for Six Years, amounts to a Leaſe, and ſhall bind the Heirs, *vid. ſupra Drake and Monday's Caſe.* And the Words of the Covenant and Grant of the Leſſee, that he ſhall pay ſuch a Rent yearly, amounts to a Reſervation, *Cr. Jac.* 207.

Covenant and grant that one ſhall enjoy the Lands, *&c.* amounts to a Leaſe.

G. H. being ſeiſed of Land in Fee, covenanted with *M. W.* to convey it by Fine or other Aſſurance to *M. W.* and his Heirs before, *&c.* which ſhould be to the Uſe of him and his Heirs, with a Proviſo, That if he paid to *M. W.* 100 *l.* at the End of 13 Years, that then he might re-enter, and that all Aſſurances ſhould be to the Coniſor; and covenanted and granted for him and his Heirs with the ſaid *M. W.* and his Heirs, That he and his Heirs ſhould enjoy the ſaid Land until the End of the ſaid 13 Years, and after for ever, if the ſaid 100 *l.* was unpaid; and *M. W.* covenanted to pay yearly two Capons, and that he would not commit any Waſte. *Per Cur'*, this is not a Leaſe, for the Intent of the Parties was, it ſhould be a Mortgage, which is but a Covenant that he ſhall enjoy during the Time of the Mortgage, and not a Leaſe, and the Covenant for quiet Enjoyment ſhews as much, *Cr. Jac.* 172. *Evans and Thomas.*

Mortgage and not a Leaſe.

Covenant and grant that one ſhall have and hold the Land, *&c.* is a Leaſe.

One *Pleaſance's Caſe*, cited *Cr. Jac.* 172. If one covenants and grants with another, that he ſhall have and hold his Lands for ſo many Years, it is a good and abſolute Leaſe: But if he covenants and grants that he ſhall enjoy his Lands for Ten Years, it is not a Leaſe, becauſe it founds only in Covenant.

It was ſaid in *Littleton* and *Pern's Caſe*, 1 *Leon.* 36, & 118, 119. If *A.* covenants with *B.* that *C.* ſhall have his Land for ſo many Years, rendring ſuch a Rent, here is not any Leaſe, and therefore no Rent; but if *A.* had covenanted with *C.* himſelf it had been otherwiſe, becauſe between the ſaid Parties.

Agreement between Strangers not to amount to a Leaſe.

An Agreement or Covenant made between *J. S.* and *J. N.* that *J. D.* ſhall have ſuch Lands for Years, this being made between Strangers cannot amount to a Leaſe. So if *J. S.* covenants with *J. D.* that his Executors ſhall have ſuch Land for Twenty One Years, this cannot amount to a Leaſe, for they are in this Degree as Strangers, *Cr. Eliz.* 173. *Porry and Allen*, and ſo is *Littleton and Pern's Caſe*, 1 *Leon.* 136.

In Indenture of Articles the Plaintiff covenants, that *Edward*, Brother of the Defendant, ſhould enjoy ſuch Lands until the Feaſt of St. *Michael* next following, rendring ſuch a Rent at the End of the ſaid Term, and that *Edward* ſhould pay ſuch Rent. The Defendant pleaded, that his ſaid Brother paid to the Plaintiff before the ſaid Feaſt of St. *Michael*, in full Satisfaction of the ſaid Rent, 3 *s.* Plea is good, and upon the Matter the Covenant well performed, for there is not any Rent in this Caſe, for here is not any Leaſe. For if *A.* covenant with *B.* that *C.* ſhall have his Land for ſo many Years, rendring ſuch a Rent,

Rent, here is not any Leaſe, and ſo no Rent; otherwiſe if *A.* had covenanted with *C.* himſelf, 1 *Leon.* 136. *Littleton and Pern.*

Where *J. S.* covenants and *conceſſit* to *J. N.* that he ſhall have Twenty Acres of Land for Twenty one Years; it is a good Leaſe, for this Word *conceſſit* is as good as *dimiſit*, 1 *Leon.* 118, 119. [*Conceſſit*] makes a Leaſe.

By Articles between *Harrington and Wiſe*, it is covenanted and agreed between the Parties, that the ſaid *James Harrington* doth let the ſaid Lands for and during Five Years, to begin at *Michaelmas* next enſuing, provided that the ſaid Defendant ſhall pay to the Plaintiff annually, during the Term, at the Feaſts of St. *Michael* and the Annunciation, 120 *l.* by equal Portions: And the ſaid Parties do covenant, That a Leaſe ſhall be made and ſealed according to the Effect of theſe Articles before, *&c.* the Feaſt of *All-Saints*. *Per Cur'*, 1. It is an immediate Leaſe becauſe of the Words, [it is agreed that he doth let,] being in the Preſent Tenſe, and that which followed is in Reference to further Aſſurance, and the rather for that it is to be made after the Beginning of the Term, ſo he ought to have the Term preſently, at *Michaelmas*. 2. This Proviſo is a good Reſervation of the Rent, *Cr. Eliz.* 486. *Harrington and Wiſe, Moo.* 459. Articles make an immediate Leaſe, tho' there is a Covenant therein that a Leaſe ſhall be made and ſealed.

The Word, Agreement, being only in the Stile, and not in the Article it ſelf, a Covenant and Promiſe alone will not amount to a Leaſe of a Freehold. *Per Tirrel*, the Reaſon of *Hob.* 33. was, becauſe the Word *convenit* was join'd with *agreeavit*, and a Covenant to enjoy has been held no Leaſe, 2 *Keb.* 268.

CHAP. V.

Of Covenants in Law, and the Operation and Conſequents upon it.

By what Words.

Conſtitute an Official, *a ſque Dexegatione.*

R. By Indenture did conſtitute the Plaintiff *Officialem ſuum*, and granted him *omnem & omnimodam, Archidiaconat' juriſdictionem ſuam, predict' abſq; impetitione, denegatione, reſtrictione*, &c. Theſe Words *abſq;* &c. do amount to a Covenant to make the Defendant ſubject to an Action, 1 *Leon.* 277. *Biſhop and Redman.*

The Word *demiſi* imports a Covenant. Plaintiff in his Declaration ſhews, That at the Time of the Leaſe made the Leſſor was not ſeiſed of the Land, but a Stranger, and ſo the Covenant in Law broken; but he did not lay any actual Entry by Force of his Leaſe, nor any Ejectment of the Stranger, nor any claiming under him, and ſo no Expulſion. *Per Cur'*, the Action did well lie, for the Breach of Covenant was, that the Leſſor had taken upon him to demiſe that which he could not, and [*demiſi*] imports a Power of Letting, as *dedi* does of Giving; and it is not reaſonable to force the Leſſee to enter upon the Land, and ſo to commit a Treſpaſs, *Hob. p.* 12. *Holder and Taylor.* And ſo by the Word [*demiſi*] Action of Covenant lies, tho' he never enter. But,

Covenant was brought upon the Word [*demiſi*] for not repairing a Pump, where the Uſe of the Pump is let. It is ſaid in 1 *Sid.* 430. *Pomfret and Rycroft, meſme* Caſe, 1 *Sand.* 321. *&* 1 *Vent.* 26, 44. Regularly no Covenant lies upon the Word [*demiſi*] unleſs in Caſe of Eviction of Leſſee, and actual Ouſter or Expulſion by the Leſſor, or a Stranger, as *Nokes*'s Caſe is; and ſo it was adjudged in the Exchequer-Chamber, that Covenant lies not. And tho' the Soil it ſelf was excepted where the Pump ſtood, yet the Leſſee may enter and repair the Pump.

Where Covenant lies upon the Word [*demiſi*] or not.

R. lets the Mannor of *D.* to *H.* for Twenty one Years, and after, by the Words *dedi & conceſſi, & ad firmam tradidi*, lets the ſame Mannor to the Plaintiff for Life, who enters and is ouſted by *H.* and ſo he brought Covenant. If the entire Eſtate for Life be evicted under the Title of the Leſſor, Leſſee ſhall not have Covenant, for by this he ſhall recover but Damages which are Perſonal, and are not a Recompence for the Loſs of a Freehold. *Aliter*, for the Loſs of Poſſeſſion for a Time, and ſo it being but a Term evicted, the Leſſee ſhall have covenant upon thoſe Words in Law. The Words in the Leaſe will enure to a double Warranty, *dedi* to a Franck-Tenement, and *dimiſi* to an Eviction for Years, *Hob. p.* 3. *R.* 28. *Yelv.* 139. *Pinchcomb and Rudge*, 1 *Rol. Rep.* 25. *Noy.* 131.

Leſſee not to have Covenant where the Eviction is of a Freehold.

The Words [aſſign, ſet over, and transfer, *vendidit, aſſignavit, & tranſtulit*,] do not amount to a Covenant againſt an *Eigne* Title, yet againſt the Covenantor himſelf it will amount to a Covenant; as a Covenant againſt all claiming by, from, or under me; and if I enter, Covenant lies againſt me upon the

[*Vendidit, aſſignavit, & tranſtulit*], how they amount to a Covenant, and how not.

Wrong: So upon the Reſervation of Rent to a Stranger, Debt lies not by the Stranger, he may have an Action of Covenant for Non-Payment, and ſo may the Leſſor: by *Hales* 3 *Keb.* 304. *Deering and Farringdon.*

Grant of an Authority, to act, *&c. abſq; impetitione, denegatione, reſtrictione,* &c. do amount to a Covenant, 1 *Leon.* 277.

Tenant for Life, Remainder in Fee to another, and the Tenant for Life, by the Words [demiſe or grant], doth make a Leaſe for Years, and dies, and after he in Remainder doth enter, and ouſt the Leſſee for Years; in this Caſe, he cannot upon this Covenant in Law charge the Executors or Adminiſtrators of the Leſſor, but upon an expreſs Covenant for quiet Enjoying he may, *Dier* 257. *Pl.* 13. 3 *Cro.* 157. *Landydale* ver. *Chruey.* 1 *Leon.* 179.

Covenant in Law ought to be fix'd upon an Eſtate.

If a Man let the Land of *J. S.* by Deed to *J. D. J. S.* being in Poſſeſſion at the Time of the Leaſe, and Leſſee enters upon *J. S.* who re-enters, yet *J. D.* ſhall not have Action of Covenant upon this, becauſe *the Covenant in Law ought to be fix'd upon an Eſtate*; but here was not any Eſtate, for this was a void Leaſe, and the Leſſee a Diſſeiſor by his Entry.

If a Stranger enters before Leſſee enters, no Covenant lies.

And by *Fenner*, If a Man let Lands for Years, and a Stranger enters before the Leſſee enter, he ſhall not have an Action of Covenant upon this Ouſter, becauſe he was never Leſſee in Privity to have this Action, 1 *Rol. Abr.* 520. but it's ſaid there in *Stile and Herring's Caſe*, If a Man let to me my own Land, whereof I am ſeiſed in Fee or otherwiſe by Indenture, if I am ouſted by another that had Right, I ſhall have a Writ of Covenant.

No Covenant in Law upon Eviction of Goods.

If a Man leaſeth certain Goods for Years by Indenture, which are evicted within the Term,

Term, yet he ſhall not have a Writ of Covenant, for the Law doth not create any Covenant upon ſuch perſonal Things, 1 *Rol. Abr.* 519. *Bedford's Caſe: Sed Qu. & vide Rolls.*

A Covenant in Law ſhall not be extended to make a Man do more than he can. *F.* and his Wife ſeiſed of Land in the Right of the Wife for Term of her Life, and they joyn in a Leaſe by the Words *Demiſe* and *Grant*. *F.* dyes, his Wife enters and avoids the Leaſe, Leſſee is put out of Poſſeſſion by Ejectment, and brings Covenant againſt the Executors of *F.* upon the Words *Demiſe* and *Grant*, and on Demurrer Judgment *pro* Defendant; the Words were, Demiſe, Grant, and to Farm let for Years, if the Wife ſhould ſo long live, 1 *Brownl.* 22.

A Covenant in Law ſhall not be extended to make a Man do more than he can.

The Defendant let to the Plaintiff an Houſe in *London* by theſe Words, *demiſe, grant, &c.* and the Leſſor covenants, That the Leſſee ſhall enjoy the Houſe during the Term without Eviction by the Leſſor, or any Claiming under him, and the Leſſor was obliged to perform all Covenants, Grants, and Articles in the Indenture. The Plaintiff grants his Term over to a Stranger in Debt; upon this Obligation the Defendant pleads Performance of all Covenants; the Plaintiff aſſigns a Breach, that one *Savery* enter'd upon the Aſſignee, and made a Leaſe for Seven Years to one *D.* if he ſhould ſo long live, who brings Ejectment againſt the Aſſignee, and recovered. Defendant demurs in Law: The Court was againſt the Plaintiff, and reſolved,

1. That by this Covenant in Law upon theſe Words, *demiſe* and *grant*, the Aſſignee ſhall not have a Writ of Covenant, *Dier* 257.

Aſſignee ſhall have a Writ of Covenant on the Words *Demiſe* and *Grant*.

2. That by this Breach of Covenant, the Obligation in Law was forfeited, for he was bound to perform all Covenants, Grants, *&c.* which extend as well to Covenants in Law, as to Covenants in Fact.

Pleading Entry by a Stranger, he muſt ſhew he had Eigne Title.

3. Altho' that the Recovery was by Verdict, yet the Plaintiff ought to have ſhewed that *Savery* had elder Title, for otherwiſe the Covenant in Law was not broken, and becauſe he did not ſhew it, for this Cauſe they reſolved againſt the Plaintiff.

4. The ſaid expreſs Covenant qualifies the Generality of the Covenant in Law, and reſtrains it by the mutual Conſent of both Parties, that this ſhall not extend further than the expreſs Covenant.

Particular Covenant ſubſequent, qualifies the general Force of this Word [*demiſi*].

And it is but Reaſon, that the particular Covenant ſubſequent ſhould qualify the general Force of this Word *demiſi*, for otherwiſe the particular Covenant ſhould be in vain, if the Force of this Word *demiſi* ſhould ſtand, 4 *Rep.* 80. *Nokes's Caſe.*

Note, When a Covenant is created by Law, the Covenantee cannot have Covenant if he be not ouſted by one who hath Title; but upon expreſs Covenant it lies, tho' a Stranger enters without Title, 2 *Brownl.* 161, 162, *b.*

Now, altho' upon expreſs Covenant to pay Rent, Covenant lies againſt the Leſſee for Rent after Aſſignment; yet it ſeems ſuch Action doth not lie againſt a Leſſee upon a Covenant in Law [as yielding and paying] after the Aſſignment, *Sid.* 447.

CHAP.

CHAP. VI.

Conſtruction.

Where expreſs Covenant qualifies the general, and where a particular Covenant doth not qualify the general.

COvenant to enjoy *abſq; legali moleſtatione*, of the Defendant, *Rainsford* conceived a general Entry no Breach, (for that ſhall be intended tortious) and the general Covenant is reſtrained by ſpecial Covenant againſt any lawful Let, 2 *Keb.* 717, 723. *Lee and Dalſton* ver. *Scurre.*

Where a general Entry, no Breach.

Johnſon and *Vavaſor* Joynt-Tenants of a Mill by Leaſe for Years. *Vavaſor* aſſigns all his Intereſt in the Mill to another, without *Johnſon*'s Aſſent or Privity, and dyes. *Johnſon* afterwards recites this Indenture by Leaſe, and that all came to him by Survivorſhip, grants the ſaid Mill and all his Eſtate, Title and Intereſt, to *Proctor*, and covenants that he ſhall quietly enjoy it, notwithſtanding any Act done by him, and Bond of Covenant, and Action of Debt upon the Bond. *Johnſon* pleads, that the Plaintiff had enjoyed it, notwithſtanding any Act done by him. *Proctor* replied, that *Vavaſor* Joynt-Tenant with *Johnſon*, aſſigned his Eſtate to *J. D.* who entered and expelled him. Defendant demurs, and it was adjudged againſt the Defendant, for the Grant was never good, for he had no Power to grant one Moiety, and yet he had expreſly granted the Mill to *Proctor*. And the

the Condition of the Obligation being to perform all Grants; the Grant being defective at the firſt as to a Moiety, which is the Subſtance of the Agreement of all the Parties, this is not qualified by the Covenant enſuing. And it is not like to *Nokes's Caſe*, 4 *Rep.* for there the Grant was good for the whole, and becomes ill by Eviction afterwards, and therefore in that Caſe the Covenant enſuing qualify'd the general Covenant, *Yel. p.* 175. 2 *Cro.* 233. *Lit.* 206. 1 *Bulſt.* 3, 4. *Proctor and Johnſon*, 2 *Brownl.* 212. *meſme Caſe. Nokes Caſe* was, The Defendant let an Houſe to the Plaintiff by the Words *demiſe* and *grant*, which Words import a Covenant in Law, and the Leſſor covenants, that the Leſſee ſhall enjoy the Houſe, during the Term, without Eviction by the Leſſor, or any claiming under him (which expreſs Covenant was narrower than the other) and gave Bond to perform Covenants. The Plaintiff grants his Term over to a Stranger. The Plaintiff aſſigned for Breach, that one *S.* entered upon the Aſſignee and recovered in Ejectment, and Debt was brought upon this Bond. *Per Cur'*, by this Covenant in Law the Aſſignee ſhall have a Writ of Covenant, and for this Breach of the Covenant in Law the Obligation was forfeited; but becauſe the Plaintiff did not ſhew that *S.* had a Covenant-Title, (for otherwiſe the Covenant in Law was not broken) Judgment againſt the Plaintiff; and *per tot. Cur'*, the expreſs Covenant qualifies the generality of the Covenant in Law, and it ſhall not extend further than the expreſs Covenant.

Where not qualified by the Covenant enſuing.

4 *Rep.* 80. *b.*

Aſſignee ſhall have this Action on a Covenant in Law.

An

An expreſs Covenant controuls an implied one, but he may uſe either of them at his Pleaſure. A ſpecial Warranty controuls a general, and the Reaſon is, no Man will take an expreſs ſpecial Warranty, when the Intent is he ſhall have a general Warranty, *per Hob. Winch* 93, 94. *Sir George Trenchard's Caſe.*

An expreſs Covenant controuls an implied one; ſo of a Warranty, and why.

Defendant by Indenture grants a Fee-Farm Rent to the Plaintiff, which he had purchaſed of the King's Lands in the late Times, and covenanted that he was ſeiſed in Fee, and had good Right to ſell, and Breach aſſigned that he had not good Right. Defendant pleads, that *ulterius agreeat' fuit in eadem Indentura*, that the Covenants in the Indenture ſhall not extend to Acts further than to Acts done by the Vender and his Heirs. Plaintiff demurs. *Per Cur'*, tho' this is a remote Agreement at the End of the Deed, and far diſtant from the other Covenant, yet this hath qualified the firſt Covenant, and reſtrains it to Acts done by the Covenantor himſelf only, *as* 4 *Rep. Nokes's Caſe*, 1 *Lev.* 57. *Brown and Brown*, 1 *Keb.* 234.

A remote Agreement at the End of a Deed, qualifies the former Part.

Conſtruction of Covenants.

A Parſon lets his Rectory for Three Years, and covenanted that the Leſſee ſhall have and enjoy it during the ſaid Term without Expulſion, or any Thing done or to be done by the Leſſor, and afterwards for not reading the Articles he was deprived by the *Stat.* 13 *Eliz. ipſo facto.* The Patron preſents another, who being inducted ouſts the Leſſee; it was on a Bond to perform Covenants. *Per Cur'*, this Matter is not any Cauſe of

Any Thing to be done by the Leſſor. A Nonfeaſance no Act.

of Action, for the Leſſee was not ouſted by any Act done by the Leſſor, but rather for Nonfeaſance, and ſo out of the Compaſs of the Covenant: As if a Man be bound, he ſhall not do any Waſte, permiſſive Waſte is not within the Danger of it, 4 *Leon.* 38, 39.

Covenant to find Victuals for a Cellerer of a Priory, which is diſſolved, he ſhall find it for the Steward.

The Prior of *Norwich* made Leaſe for Life by Indenture, in which the Leſſee covenanted to find Victuals to the Cellerer at all Times when the Cellerer came thither to hold Courts. The Priory was diſſolved, and the Poſſeſſions given to the Dean and Chapter newly erected. The Court held, that the Leſſee ſhould perform that Covenant to him who ſupplied the Office of Cellerer, *i. e.* the Steward, 4 *Leon.* 187.

Periculis & caſualitatibus Maris exceptis. To what it extends.

Merchants by Charterparty covenant with the Owners, that the Ship ſhall return into the River of *Thames* in a certain Time, *periculis & caſualitatibus Marium*, [*Anglice*, Danger of the Sea *exceptis*]. The Ship is taken by Pirates, it is within the Exception, and it extends to Pirates as well as Tempeſts, 2 *Rol. Abr.* 248. *Pickering and Barkley, Stiles* 132.

Covenant to repair, extend to Houſes after built.

Leſſee covenants to build Three Houſes on the Premiſſes, and to keep them in Repair; and it's alſo covenanted to deliver up *dicta premiſſa & domus, & edificia ſuperinde fore erect.* He builds Four Houſes, and lets one fall to Decay: This Covenant extends to the 4th, 1 *Vent.* 126. *Douſe and Cale, & 3 Lev.* 264.

Covenant in the Copulative and in the Disjunctive.

The Covenant is, That the Defendant would not take Timber without the Aſſent and Aſſignment of the Leſſor or his Aſſigns in the Disjunctive; and in the Breach, the Plaintiff charged the Defendant with cutting of Timber without the Aſſignment of the Leſſor or his Aſſigns; ſo he would compel the

the Defendant to prove more than he ought, for if he did it with their Aſſent only, or Aſſignment only, it had been ſufficient; but if the Covenant had been in the Copulative, both had been neceſſary, 1 *Leon.* 250. *per Hobart, Sheerwood, and Noun.*

By Vertue of his Leaſe, the Tenant of common Right may take neceſſary Fewel upon any Part of the Land leaſed, 28 *H.* 8. 19. The Leſſor covenants, that the Leſſee ſhall have ſufficient Hedgeboot, by the Aſſignment of the Baily. It is holden by *Baldwin and Shelle's Caſe*, That the Leſſee may take it without Aſſignment, becauſe there are no negative Words, *& non aliter*, 1 *Leon.* 251.

Take Hedgeboot by Aſſignment of the Bail.

The Defendant covenanted with the Plaintiff, that after Aſſertainment of the Profits of the Land, the Defendant ſhall have one Moiety of the Profits, and the Plaintiff the other; there need no other Averment of the Aſſertainment, but that the Defendant had received ſo much Profits of the Land, 1 *Sand.* 48, 49, 50.

Averment of Aſſertainment.

Certain Lands with a Stock of Sheep were Leaſed by Indenture, and the Leſſee did covenant by the ſaid Indenture to reſtore to the Leſſee at the End of the Term ſo many Sheep in Number as he took in Leaſe, and that they ſhould be between the Age of Two and Four Years. Afterwards the Leſſee granted the ſame Stock to a Stranger, whereas in Truth all the ancient Stock was ſpent. It was held by all the Juſtices on Evidence given at the Bar, that when ſuch a Stock of Sheep is leaſed for Years, the principal Property doth remain in the Leſſor as long as thoſe Sheep which were *in eſſe* at the Time of the Leaſe ſhould live; but if any of them dye,

Leaſe of a Stock of Sheep, and the old ones dye, and new ones are put in their Rooms.

dye, and other come in their Rooms, then the Property of thoſe new Sheep doth belong to the Leſſee; and therefore they held, that the ſecond Leſſee ſhould have ſo many of the Sheep as were left and did remain at the End of the Leaſe, and no other, *Godb.* 113. *Wood and Aſh, Owen* 139. 1 *Leon.* 42.

Covenant to leave in as good Plight, and cuts down a Tree.

Leſſee covenanted to leave the Houſes, Trees and Woods, at the End of the Term in as good Plight as he found them, and afterwards the Leſſee cut down a Tree. In this Caſe the Covenant is broken, and the Leſſor ſhall not ſtay till the End of the Term to bring his Action of Covenant, becauſe it is apparent that the Tree cannot grow again, and be in as good Plight as when he took the Leaſe, *Godb.* 335.

Where Defendant is between Enjoyment during the Term, and during the Term of Twenty Years.

Tenant for Life makes a Leaſe for Twenty Years, and covenants that he ſhall enjoy it during the Term; that ſhall be conſtrued during his Life, for the Term ended by his Death: *Aliter*, if he had covenanted during the Term of Twenty Years, 1 *Brownl.* 22.

An Act done, tho' after Words diſſolved or reverſed by Law, ſaves the Performance.

One covenants that *T. H.* Son and Heir apparent of *J. H.* ſhall marry *E. L.* before the ſaid *T. H.* and *E. L.* ſhall fulfil their ſeveral Ages of 14 Years, if *E. L.* would conſent thereunto; afterwards *T. H.* married *E. L. T. H.* being then Thirteen Years old, and *E. L.* Nine Years old and no more; after *T. H.* came to the Age of Fourteen Years, and diſagreed to the ſaid Marriage. All this was pleaded in Bar as a Performance of the Covenant, and good: The Covenantor is bound that *T. H.* ſhall marry *E. L.* which was executed; but he is not bound to the Continuance of it, but that ought to be left to the

Law. If *J.* be bound to you, that *J. S.* (who in Truth is an Infant) ſhall levy a Fine before ſuch a Day, which is done accordingly, and afterwards the ſame is reverſed by Error, yet the Condition is performed, 1 *Leon. p.* 52. *Leigh and Hanmer.*

Covenant in many Caſes to extend further than the Words.

A. and *B.* are Executors to *C.* who was a Freeman of *London*, and *A.* upon the Marriage of *E.* the Daughter of *C.* covenants with *F.* who is to marry with *E.* *Quod licitum foret prefat' F. de tempore in tempus poſt maritagium prædict' videre & perſcrutare omnes tales computos qui tangerent*, the Eſtate of *C.* the Teſtator, by which he may view what Monies are due to be paid to *E.* In this Caſe, if *B.* the other Executor had ſome Accounts which concern the ſaid Eſtate of the Teſtator, and *F.* requeſts *A.* and *B.* to view and ſearch the ſaid Accounts, and *B.* refuſeth to permit him to do it, but *A.* ſaith he will not deny him to do it, yet *A.* had broken the Covenant; for by this Covenant he had undertaken for *B.* and all other Strangers who have any ſuch Accounts, that they ſhall permit *F.* to view and ſearch them by Force of the Words of the Covenant [*Licitum foret præfat'* F. &c.] *H.* 8. *Car. B. R. Roberts and Willmot.* Where a Covenant extends further than the Words.

If a Leaſe for Years be made to *A.* determinable upon the Lives of *B. C.* and *D.* and after *B.* dies, and after *A.* aſſigns to *E.* and after *E.* by Indenture reciting the ſaid Leaſe, and the Death of *B.* and the Aſſignment to him by the ſaid Indenture, now aſſigns to *F.*

F. and covenants with him, that he himſelf is lawfully poſſeſſed of all the Premiſſes of a good and ſufficient Eſtate for the reſidue of the ſaid Term then to come: *If the ſaid* C. *and* D. *and either of them, ſhall happen ſo long to live, and they the ſaid* C. *and* D. *are yet in full Life*; yet this is imploied by the Words, and this ought to be a ſeveral Covenant, or otherwiſe this laſt Part would be void and of none Effect. *Inter Baker and Scott*, Tr. 11 *Car.* 1. in which the Breach was aſſigned, for that *C.* was dead at the Time of the Aſſignment *F.* made to him, and the Word [that] was added to the other Words in the Declaration, and the Defendant demanded Oyer of the Declaration, which was enter'd in *hæc verba*, in which the Word [that] was not yet, for that this was no more than the Law implies, it was adjudged good, 1 *Rol. Abr.* 249.

Several Covenant.

Declaration a Grant from the Covenant.

A. ſeiſed of Lands lets it for Years, and covenants and grants to and with the Leſſee, his Executors and Aſſigns, That it ſhall be lawful for him to take and carry away to his own Uſe ſuch Grain that ſhall be growing on the Land at the End of the Term, tho' the Word Covenant be joined with the Word Grant, and tho' the Words are not by way of Gift of the Grain, but that it ſhall be lawful for him, *&c.* yet this ſhall be a Grant, and ſhall transfer the Property of the Grain that ſhall be growing at the End of the Term, for the Intent of ſuch Words in common Uſe amount to ſo much as the Clauſe, without Impeachment of Waſte, tranfers a Property in the Trees, *Hob. Grantham and Hawley.*

Where the Words [It ſhall be lawful to carry away,] transfer a Propriety.

One

One covenants to make a Leaſe of all his Lands in *D.* and in *D.* he hath as well Copyhold as Freehold Lands, he is not by this Covenant to make a Leaſe of his Copyhold Land, for that he cannot do without Licence, *per Anderſon, More* 294. *Crocock and White.*

Covenant, to make a Leaſe of all his Lands in *D.* and he hath Copyhold there.

Bond or Covenant, That if the Defendant ſhould work out the 40 *l.* (which he owed, *&c.*) at the uſual Prices in Packing, when the Plaintiff ſhould have Occaſion for himſelf or his Friends to employ him therein, or otherwiſe ſhall pay the 40 *l.* then, *&c.* Defendant pleads, that he was always ready to have wrought out the 40 *l.* but that the Plaintiff did never employ him; ill Plea, becauſe the Defendant did not aver that the Plaintiff had any Occaſion to make Uſe of him, and for that it was at his Election to have Work or Money; and not having employed him, but brought his Action, that is a Requeſt in Law, and ſo he hath determined his Election to have the Money. Judgment *pro Quer.* 2 *Mod.* 304. *Wright and Bull.*

Disjunctive Election.

Defendant covenanted, If the Plaintiff marry his Daughter, to pay to him 20 *l. per Annum*, without mentioning *Quamdiu*, and aſſigns a Breach in Non-Payment for two Years. Defendant *quoad* the firſt Year pleads Payment; and *quoad* the other demurs, ſuppoſing that no Time being limitted, that he was not bound to pay more than one Year; but the Court inclined that the Payment ſhall be for Life, for Yearly imports more than one Year; but whether for the Life of the Husband or the Wife *non determinat' fuit*; ſome ſaid for the Life of the Husband, becauſe it is in lieu of a Portion, and ſhall be taken ſtrong againſt the Covenantor; others

Covenant, If the Plaintiff marry his Daughter, to pay to him 20 *l. per Annum*, and ſaith not how long.

Of the other Part was *Levins* 102. *Hook and Swain*, 1 *Lev. Sid.* 151.

for the Life of the Wife, becauſe it is for a Marriage-Portion for her: *Death and Benns's Caſe*, 3 *Jac.* 2. A Widow covenanted on Marriage with her Husband, that he ſhall enjoy the Lands of the Wife during their Joint Lives, and the Husband covenanted with the Truſtees of the Wife to pay to them 20 *l.* yearly, and adjudged for their Two Lives.

Covenant. Conſtruction.

If the Words of a Covenant be, [That the Leſſee ſhall have Thorns by the Aſſignment of the Leſſor, and neceſſary Fuel alſo;] it ſeems by this that there muſt be an Aſſignment of the Fuel as well as of the Thorns, *Dier* 19.

Diverſity between affirmative Words and negative.

If the Leſſor covenant with his Leſſee, that he ſhall have ſufficient Hedgeboot, by Aſſignment of the Bayliff of the Leſſor, by this the Leſſee is not reſtrained from that Liberty that the Law doth give him, and therefore he may take without Aſſignment; but if the Words be negative, that he ſhall not take without Aſſignment, or that he ſhall take by Aſſigment and not otherwiſe, *contra*, *Dier* 19. *b.*

If a Man makes a Leaſe for Years of a Mannor, and covenants that the Leſſee ſhall make Eſtates for Life or Years, and that they ſhall be good in this Caſe; it ſeems this Covenant ſhall not be taken to enable the Leſſee to make Eſtates for a longer Time than his Eſtate will bear, *per Juſtice Bridgman.*

If one makes a Leaſe for Ten Years, and covenant, That if the Leſſee pay him 10 *l.* within the Ten Years, that he ſhall have the Fee-Simple, and the Leſſee ſurrenders his Eſtate

Eſtate within the Time; in this Caſe, if the Leſſee pay the Money, the Leſſor is bound to make the Fee-Simple to him: But if the Words of the Covenant be, That if he pay him 10 *l.* within the Term, he ſhall have Fee, and the Leſſee ſurrenders his Term, and then pays the 10 *l.* In this Caſe the Leſſor is not bound to make the Fee-Simple, for it was not paid within the Term, 1 *Rep.* 144.

If Two make a Leaſe, and covenant that the Leſſee ſhall enjoy the Land without the Let of them or any other, and One of them alone doth diſturb the Leſſee, this is a Breach of the Covenant.

Debt on Bond againſt G. a Merchant Stranger. Defendant pleaded that the Bond was for Performance of Covenant, in certain Indentures contained and ſhewed what, *&c.* and alledged further, that in the ſaid Indenture there is a Proviſo, That if any *Lis vel controverſia oriatur impoſterum*, by Reaſon of any Clauſe, Article, or other Agreement in the ſaid Indenture contained, that then before any Suit thereupon attempted, the Parties ſhall chooſe Four indifferent Perſons for the ending thereof; which being done, the Indenture and Obligation ſhall be void. And *in facto dicit quod Lis & controverſia*, upon which the Action is brought, groweth upon the ſame Indenture. Plaintiff demurs, and becauſe the Defendant did not ſhew ſpecially upon what Controverſy and Strife, and upon what Article certain, the Court were clearly of Opinion the Bar was ill, and the Court were of Opinion that the ſaid Proviſo did not extend to ſubject and ſubmit the Breach of every Covenant or Article, *&c.* but only where the Controverſy doth ariſe upon the Conſtruction

The Clauſe [If any Strife ariſe, to be ſubmitted to Arbitrament] how to be conſtrued.

of any Covenant, *&c.* within the ſame, 1 *Leon.* 37. *Parmot & Griffin.*

A Man ſeiſed in Fee of a Parcel of Land, called *Parkhill*, containing 60 Acres, and divides this into Three Parts, and lets one Part of it to *A.* for Years, and after, during the Term, makes a Leaſe to *B.* by theſe Words, *ſcilicet*, [*Two Parcels of Parkhill*], containing in it ſelf 60 Acres of Land for Years, altho' that all the Three Parts do not exceed 60 Acres, yet but Two Parts ſhall paſs by this Grant, for the Intent of the Grant appears to be ſuch, and ſo the Leſſee ſhall not have a Writ of Covenant for the other Third Part, 2 *Rol. Abr.* 50. *Floyd and Petty.*

Maſon leaſed Lands to *R.* for Years, and afterwards leaſed the ſame Lands to *Tinter* for Years. *Tinter* covenants with the Defendant, That if the ſaid *R.* ſhould ſue *Maſon* by Reaſon of the latter Leaſe, that then he would indemnify *Maſon*, and pay to him all the Charges by Reaſon of any Suit to be brought by the ſaid *R.* in reſpect to the ſaid former Leaſe; and *Maſon* by the ſame Indenture covenants with *Tinter*, That the Land demiſed ſhould continue to *Tinter*, diſcharged of former Charges, Bargains and Incumbrances. *Tinter* brought Action on the Second Covenant, and ſhewed that *R.* had ejected him. *Maſon* pleads the ſaid Second Covenant, intending that by that latter Covenant the Plaintiff had Notice of the former Leaſe made to *R.* ſo that the firſt Leaſe ſhall be excepted out of the Covenants of former Grants, to avoid Circuity of Action. *Cur' contra*, for the Covenant of *Maſon* ſhall go to the Diſcharge of the Land, but the Covenant of *Tinter* only to the Poſſeſſion, 3 *Leon.* 123. *Maſon's Caſe.*

Conſtruction

Conſtruction according to Intent.

Defendant covenanted, That the Plaintiff, his Executors, *&c. valeant & poſſint habere*, for 7 Years, from the 29th of *September* then next enſuing the Date, *&c.* ſeven Parts of all the Grains made in the Defendant's Brewhouſe, *&c.* and aſſigns one Breach (*inter alia*) that he, with Intention to deceive the Plaintiff, did put divers Quantities of Hops into the Malt, by which the Grains were ſpoiled. It was moved in Arreſt of Judgment, that this Breach is out of the Articles, *viz.* The putting in Hops into the Grains, and the Damages being entire, the Plaintiff ought not to have Judgment. *Per Cur'*, The Intention of the Parties is to be conſidered in all Contracts; and it was the Intent of the Parties, that the Plaintiff ſhould have the Grains for the Uſe of the Cattle, and they will not eat them when Hops are put in: So if I covenant, that I will leave all the Timber which is growing on the Land (I hire) at the End of the Term; if I cut them down, though I leave them on the Land, it is a Breach of Covenant. So if I covenant to deliver ſo many Yards of Cloth, and I cut it in Pieces, and then deliver it, it is a Breach of Covenant, for the Law diſcountenances all Acts which are *in Fraudem Legis*. *Ray.* 464. *Griffith* and *Goodhand*. *Et* Sir *Tho. Jones*, 191.

The Intention of the Parties is to be conſidered in Contracts.

Covenant to leave the Timber on the Land. If I cut it down and leave it, it's no Performance.

A Covenant not to aſſign a Thing in Action to any Perſon whatſoever; an Aſſignment in Equity is a Breach of the Covenant, for, in Law, no Aſſignment can be of a Thing in Action; therefore the Intent of the Covenant muſt be ſuch an Aſſignment as

Covenant not to aſſign a Thing in Action.

can be ſaid an Aſſignment in Equity. *Raym.* 459, 460, 461. *Et* Sir *Tho. Jones* 150.

Covenant that he ſhall not moleſt or hurt the Obligee to what it doth not extend.

If Covenant or Condition be, that he ſhall not moleſt or hurt the Obligee or Covenantee, *Ratione alicujus rei cujuſcunque*, it ſhall be intended he ſhall not hurt tortiouſly; but not to reſtrain him from proſecuting the Obligee for Felony, or other juſt Cauſe. *Cro. Eliz.* 705. *Dobſon* and *Crew*.

Covenant to pay all Taxes (in Biſhop's Leaſes.)

The Covenant to pay all Taxes (in Biſhop's Leaſes), is not intended of any other Taxes than ſuch as were in Being and Uſe before, and ancient for Leſſees to pay; and that was only againſt Synodals, Procurations, Tenths and Subſidies, and not to Charges of another Nature. 3 *Keb.* 69. *Davenant* and the Biſhop of *Salisbury*. 2 *Lev.* 68. 1 *Vent.* 223.

Conſtruction on Covenants.

Reg. *When a Man is bound to do or permit a Thing, he ought to do or permit all which depends upon it in the Performance of the Thing.* 11 H. 4. 25. 1 Rol. Abr. 422.

Collateral Things to be done or permitted.

Collateral Things muſt be done or permitted. A Covenant to levy a Fine, it muſt be at his Coſts who levies it. A Man is bound to carry my Corn, it is no Plea for him to ſay, he had no Cart, for he is bound by Implication to provide a Cart, and all other Neceſſaries for the Carriage: So to mow my Graſs, he muſt find Inſtruments. 16 *H.* 29.

Covenant, That *J. S.* ſhall have Ingreſs into his Houſe, he ought to have common Entrance at the uſual Door, and ſhall not be put to enter by an Hole backward; nor may the other make a Ditch before the Door. If

I covenant to ſuffer *J. S.* to have a Way over my Land, if I lock the Gates, I have broken my Covenant. *Latch.* 47.

Reg. *A Man ſhall be ſuppoſed by the Covenant to do what properly belongs to him.*

Covenant was, That the Great Bell of *M.* ſhould be carried to the Houſe of the Covenantor in *W.* at the Coſts of the Men of *W.* and there to be weigh'd in the Preſence of, *&c.* the Covenantor ought to weigh it, for it belongs to his Occupation. 1 *Rol. Abr.* 465. *Pl.* 32.

If a Man be bound to mow my Graſs, he muſt find Inſtruments.

Covenant to ſerve his Leſſor with Carts, as he ſhall be required; Breach laid, that he requeſted him to bring Three Loads of Coals. Leſſee pleads, That at that Time he had not any Cart or Carriage. *Latch.* 202. It's no Plea, for he is bound by Implication to find a Cart, *&c.*

If Leſſee of an Houſe covenant not to Leaſe the Shop, Yard, or other Things pertaining to the Houſe, to one that ſells Coals, and after he lets all the Houſe to one that ſells Coals, he has broken the Condition, for he had broken the Intent. 1 *Rol. Abr.* 427. *Bonner* and *Langley.*

Reg. *Voluntary Acts of the Leſſor,* &c. *and a Miſfeaſance to avoid or admull their own Grant, may amount to a Breach of Covenant.*

If a Man by Deed grants a Water-Courſe, and ſtops it up, the Grantee ſhall have Action of Covenant againſt him: So if a Leaſe be made of an Houſe and Eſtovers, if Leſſor deſtroys all the Wood out of which the Eſtovers were to be taken, Leſſee ſhall have Action of Covenant againſt the Leſſor. So Miſfeaſance.

Aliter in Caſe of Nonfeaſance.

if a Man by Deed demiſe a middle Room, and after will not repair the Roof. *Aliter*, in Caſe of Nonfeaſance, as was *Pomfret* and *Rycroft*'s Caſe. If a Leaſe be made of an Houſe and a Piece of Land (except the Land upon which a Pump ſtood) with the Uſe of the ſaid Pump, the Leſſee may repair the Pump; but no Action of Covenant lies againſt the Leſſor for not repairing it, 1 *Sand.* 322. For here is no Misfeaſance, but a Nonfeaſance.

Reg. *Covenant to be performed in convenient Time.* *Vide* Requeſt.

If *W.* in Conſideration that *T.* will marry his Couſin before the Return of *W.* from *London* to *Norwich*, aſſumes and promiſeth, after his Return from *London* to *Norwich* aforeſaid, to pay to *T.* 10 *l.* and to find ſufficient Surety to pay 40 *l.* more at the Death of *W.* and after *T.* marries with *M.* and *W.* returns from *London* to *Norwich*, he ought to pay the 10 *l.* and find the Security for 40 *l.* within a convenient Time after his Return; and there need no Requeſt, for he had taken upon him to do it at his Peril. 1 *Rol. Abr.* 438. *Peeter* and *Carter*.

Where needs no Requeſt.

If a Man covenant to make further Aſſurance at all Time and Times, at the Charges of the Covenantee, and Councel adviſeth he ſhall levy a Fine, yet he is not bound to do it preſently, but he ſhall have convenient Time to do it, though the Words are, That he ſhall do it [*at all Times*], for the Words ought to have a reaſonable Conſtruction. 1 *Rol. Abr.* 441. *Perpoint* and *Thimbleby*.

[*At all Times*] how to be expounded.

But

But if it be to convey Land upon Requeſt, if a Writing purporting a Conveyance be tendered to him with Requeſt to ſeal it, he ought to ſeal it preſently. *Id. ibid. Somes* and *Smith.*

In Covenant, a Special Verdict was found: The Caſe was, in Conſideration of 20 Guineas, paid by the Plaintiff to the Defendant on ſuch a Day, *&c.* he did covenant, *&c.* upon Payment of 500 *l.* more, within one Month next following, upon Notice to transfer to him certain Shares in the *Eaſt-India* Company; and the Plaintiff did aver, That he did tender the 500 *l.* within a Month, *&c.* Defendant pleads, The Plaintiff did not tender the 500 *l.* within a Month, for that before ſuch Tender, 28 Days were paſt from the Day of the Date of the Agreement; the Truth was, he did tender the 500 *l.* after 28 Days, but within a Kalender Month, and it was ſo found by the Jury. The Qu' was, What ſhall be intended a Month within this Agreement? Regularly a Month is accounted no more than 28 Days, unleſs it is in a *Qu' Imped'*, and there a few more Days are allowed, on purpoſe to ſave a Lapſe. 1 *Inſt.* 135. *Yelv.* 100. 2 *Cr.* 166. 'Tis likewiſe ſo in a Leaſe rendring Rent, at the Two moſt uſual Feaſts in the Year, or within a Month after; and if it is behind by the Space of 8 Weeks, then, *&c.* theſe Eight Weeks ſhall be reckoned according to 28 Days, by the *Stat'* 2 *Ed* 6. The Suggeſtion on a Prohibition ought to be proved within 6 Months next after the Prohibition granted; the Computation muſt be after the Rate of 28 Days to a Month; and ſo it was held in the Principal Caſe. 4 *Mod.* 185. *Barkadale* and *Morgan.*

Month, how to be computed.

Con-

Conſtructions of Words, Sentences, and relative Clauſes in Covenants. Vide Sparſim.

Covenant or Condition faithfully to execute the Office of, *&c.* and Quarterly to make accompt of all Monies by him receiv'd, *&c.* and pay all Monies by him received, and to account at ſuch Times as he ſhall be reaſonably required. Defendant pleads Performance to all but the Account, and for that he ſaith he was never reaſonably required to do it. *Per Cur'*, this Clauſe [*being reaſonably required*] goes only to the Payment of the Money, being the laſt Antecedent, and the Accompt is limited to be made Quarterly. *Litt. Rep.* 101. *King* and *Point*'s Caſe.

Being reaſonably required.

[*During the Term*]. Covenant upon Indenture of Leaſe for 9 Years, dated the 1ſt of *June*, 16 *Car.* 2. which was to ſave the Plaintiff harmleſs of all Evictions during the ſaid Term, and the Breach aſſigned was Eviction 26 *June*, 16 *Car.* 2. Defendant pleads, That the ſaid Deed was *Primo deliberat'*, 1 *June*, 17 *Car.* 2. which was after the Breach aſſigned; and pleads further, That the Plaintiff was not ejected after the Delivery of the ſaid Deed: Upon this the Plaintiff demurs; and *per Cur'*, theſe Words [*during the Term*] ſhall be conſtrued during the Term in Computation, and not only from the Time of the Delivery of the Deed, when it firſt commenced in Point of Intereſt, and Judgment *pro Quer'*. 1 *Sid.* 374. *Lewis* and *Hilliard*. 2 *Keeble* 377.

[*During the Time*]. Covenant or Condition. Whereas the Lord *A.* deputed *T. J.* to be his Deputy Poſt-Maſter, to execute the ſaid Office from, *&c.* for the Term of 6 Months following: Now if the ſaid *T. J.* covenants for

for and during all the Time, that he ſhall continue Deputy Poſt-Maſter, execute and pay ſuch Money, *&c. Per Cur'*, the Covenant refers to the Recital only, whereby the Defendant was bound only during the Six Months, and no longer, and the indefinite Time ſhall be conſtrued during the Six Months. 2 *Sand.* 411. Lord *Arlington* and *Merrick.*

[*Payments*]. A Condition to perform all Covenants, Payments and Agreements, contained in a Deed-Poll. Defendant pleads the Deed-Poll in *hæc verba*, in which was contained one Grant of Lands for 100 *l.* and 200 *l.* to be paid; in which was a Proviſo, If the Defendant ſhould not pay for the Plaintiff to *J. S.* 40 *l.* ſuch a Day, the Bargain to be void: The Defendant pleads Performance of all Covenants; the Plaintiff aſſigns a Breach in not Payment of the 40 *l.* Defendant demurs; Judgment *pro* Defendant; the Word [*Payment*] in the Condition, ſhall have Relation only to ſuch Payments mentioned in the Deed as is compulſory to the Defendant; but this was not, for the Defendant, if he will, may forfeit his Land. 1 *Brownl.* 113. *Briſco* and *King. Et* 2 *Cro.* 281. *Yel.* 206. But 2 *Levin.* 116. *Tomles vide Chandler*, is contrary.

[*Ballaſt*]. Condition or Covenant was, to enjoy a Ship without Diſturbance. The Caſe was, after Sale of the ſaid Ship, a Stranger ſues the Plaintiff for Money due for certain Ballaſt bought by the Defendant, and put into the Ship before the Sale of the Ship. *Per Cur'*, Ballaſt is no Furniture of a Ship, but Guns are, 1 *Leon. Caſe* 59. *fo.* 46. *Kinter's* Caſe.

Note,

Note, The Heir is comprehended within the Word, *Aſſigns*, with Reſpect to the Performance of Conditions and Covenants. *Hardr.* 11. *Plo.* 288. 5 *Rep.* 96.

[*At all Times*]. *Vide ſupra*, *Perpoint* and *Thimbleby*'s Caſe.

[*Suffer*]. A Man makes a Leaſe for Years, *&c.* and a Bond, with Conditions, That he ſhall ſuffer the Leſſee peaceably to enjoy during the Term, and that without Trouble or Eviction of the Leſſor, or any other Perſon. *Per Cur'*, The Word [Suffer] ſhall rule all the Reſidue of the Sentence: So that by Entry of a Stranger on the Leſſee, without Procurement of the Leſſor, the Obligation is not forfeit. *Dyer* 255. *Pl.* 4.

[*But that*]. A Man aſſigns a Leaſe for Years, and Covenants that he had not made any former Grant, or any other Thing by which this Leaſe may be in any manner fruſtrate; [but that] the ſaid Aſſignee and his Executors, by vertue of this Grant and Aſſignment, may quietly enjoy the Premiſſes during the Term, without the Diſturbance of him, or any Perſon. The Words [*but that*] depends upon the former Words, and is not new Matter or Sentence; and for this, the Entry of a Stranger upon Eigne Titles had not broken the Condition. *Dyer* 240. *b.*

[*Then next following*]. In Aſſumpſit about the Communication of the Marriage of his Daughter. The Defendant promiſed him, That if he would haſten the Marriage, and ſhould have a Son within 12 Months then next following, he would give him 100 *l.* He ſets forth he did haſten the Marriage, and had a Son within 12 Months after the Mar-

Marriage, and had a Verdict: It was moved in Arreſt of Judgment, That the Plaintiff had not ſet forth he had a Son within the Time, for [then next following] ſhall be referred to the Time of the Communication; but *Cur' contra.* 1 *Vent.* 262.

[*Charges*]. If one covenant with another to acquit him of all Charges iſſuing out of the Land, and after by Parliament the 10th Part of the Value, not of the Iſſues of all Lands, are given to the King; in this Caſe, it ſeems the Covenant ſhall not extend to this: But if the Parliament had given the 10th Part *exituum Terre*, the Covenant would have extended to this, as well as to Rents, Commons, and ſuch-like Things, wherewith the Land is charged. *Fitzh.* Covenant 2. *Brok.* Grant 164.

[*Extunc*]. If one Covenant to Levy a Fine at next Aſſizes for 13 Years *extunc*, this ſhall be taken from the Time of the Fine levied, and not from the Time of the Covenant. *Cur', Hill.* 7 *Jac. B. C.*

[*At all Times*]. A Man covenants to make Aſſurance at all Time and Times, *&c.*

How [*at all Times*] ſhall be conſtrued. *Vide ſupra.*

[*Within one Month*]. Covenant was to make farther Aſſurance, *&c.* within one Month, when he ſhall be thereunto required. *Per Cur'*, The Month ſhall be after the Requeſt, and not within a Month after the Date of the Bond. *Stiles, p.* 242. *Wentworth's* Caſe.

[*Miles*]. Covenant to do a Thing, or not do it, within 4 Miles of *Rye.* Miles ſhall be conſtrued 4000 Paces, *Cr. Eliz.* 412. *Minge and Earle.*

Several

CHAP. VII.

Several Sorts of Covenants.

Covenants, *viz.* { Deed. / Law.

Covenants, { Affirmative. / Negative.

Covenants, { Real. / Perſonal.

Covenants, { General. / Particular: And where the Particular Covenant ſhall qualify the General.

Covenants, { Joint. / Several.

Covenants, { Obligatory. / Declaratory.

Covenants, { Mutual: Reciprocal. / Diſtinct, or Several.

Some Covenants are executed, *i. e.* That a Thing is done already, and ſome Executory, *i. e.* That a Thing ſhall be done hereafter; and theſe are good: But if it be of a Thing preſent, as I covenant that my Horſe is yours; it is void.

There is Difference between Covenants *Declaratory*, and Covenants *Obligatory*: Covenants Declaratory ſerve to limit and direct Uſes; Covenants Obligatory, as to enjoy free from Incumbrances, ſhall never be conſtrued to raiſe an Uſe, becauſe they have another Effect. 1 *Sid.* 27. in *Hore* and *Dix's* Caſe.

There

There is difference between Covenants in Indentures, and in Deeds-Poll; or,

Who ſhall be ſaid Parties to the Indenture, ſo as to be charged with it, or to take Advantage of it.

If an Indenture of Charter-Party between *A.* and others, Owners of the Ship called *E.* whereof *B.* is Maſter of the one Part, and *C.* of the other Part; in which Indenture *A.* covenants with *C.* and *B.* and *C.* covenants with *A.* and *B.* and binds himſelf for Performance of Covenants in 600 *l.* and the Concluſion of the Indenture is, *In Witneſs whereof, the Parties aboveſaid have put their Hands and Seals*; and the ſaid *B.* to the ſaid Indenture put his Hand and Seal, and delivers it. In this Caſe, *B.* is not any Party to this Indenture, ſo that *B.* may not releaſe any Action brought upon it, for this is an Indenture Reciprocal between Parties of the one Part, and Parties of the other Part; in which Caſe, no Obligation, Covenant or Grant, may be made with any who is not Party to the Deed; but where the Deed is not Reciprocal, but is without the Words [*Between*, &c.] as, *omnibus Chriſti fidelibus*, &c. there a Covenant, Grant or Obligation, may be made to divers ſeveral Perſons. *C. M. Ch.* 673. 2 *Rol. Abr.* 22.

No Covenant or Grant to be made with any who is not Party to the Deed in Indentures. *Aliter* in a Deed-Poll.

If Indenture of Charter-Party be made between *A.* and *B.* Owners of a Ship of the one Part, and *C.* and *D.* Merchants, of the other Part; and there are ſeveral Covenants on the one Part, and on the other; and *A.* only ſeals the Indenture of the one Part, and

and *C.* and *D.* on the other Part; but in all the Indenture it is mentioned, That *A.* and *B.* covenant with *C.* and *D.* and *C.* and *D.* covenant with *A.* and *B.* in this Caſe *A.* and *B.* may join in Action againſt *C.* and *D.* on this Indenture for Breach of Covenant, though *B.* never ſealed the Deed, for he is Party to the Deed, and *C.* and *D.* had ſealed the other Part to *B.* as well as to *A,* upon which the Action is brought. 2 *Rol. Abr.* 22. *Clements* and *Henly.*

One who is Party to the Deed, tho' he never ſealed, may join in Action of Covenant.

Tooker, the Defendant, covenanted with *Tooker,* his Son, and *Anne Slade* (one of the Defendants, whom he intended to marry), to give them Meat and Drink in his Houſe; and if any Diſcontent ſhould happen between the Father and the Son, ſo that he and his Wife *Anne* ſhould diſagree to dwell with *Tooker* the Father, then they ſhould have Six Beaſts, *Gates,* &c. *Tooker,* the Son, died; *Anne* diſagrees to dwell with *Tooker,* the Father, and marries with one *Crabb*; who, with his Wife *Anne,* brings the Action. *Per Cur'*, the Declaration is not good, and the Breach not well aſſigned, the Caſe is grounded upon the ſecond Covenant, which conſiſts upon a Contingency; which Contingency is, if there happen any Diſcord, *&c.* the Words are joint, and they ought all to diſagree: True it is, in ſome Caſes, a Conjunctive ſhall be taken for a Disjunctive; but this is according to the Matter and Circumſtance of the Fact, but in this Caſe it ſhall not be taken disjunctively: Alſo it is alledged in the Declaration, that ſhe diſagreed; whereas a mutual Diſagreement between all ought to be alledged, and Judgment was, *Quer nil. cap.* But all agreed, the Wife might

have boarded with *Tooker*, the Father, but her new Husband could not. *Pop.* 204. *Crab & Ux.* verſus *Tooker.*

Covenants Disjunctive.

Election of the { *Covenantor.* / *Covenantee.*

Covenant is, That the Covenantor ſhall pay to the Covenantee, *&c.* at the Choice and Election of the Covenantee, within a Month after the Death of *J. S.* 30 *l.* or 20 Kine. Defendant pleads, That the Plaintiff, within the Month after the Death of *J. S.* did not make any Choice or Election. It is a good Plea, for the Covenantor is not bound to make a Tender of both, and the Election of the Plaintiff ought to precede the Tender of the Defendant. 1 *Leon.* 69. 70. *Baſſet* and *Kennes* Caſe. *Moor* 241.

Election ought to precede Tender.

Covenant to deliver ſuch Obligation before ſuch a Day, or to pay him 10 *l.* if he requeſts it; if he doth not requeſt the 10 *l.* the Covenantor ought to deliver the Obligation, for he had not Election till Requeſt made; but after Requeſt made he had Election, which of them he would do. 1 *Rol. Abr.* 447.

Defendant covenants to deliver to the Plaintiff before ſuch a Feaſt, ſuch a Ship and Tackle; or, in Default thereof, to pay at the ſame Feaſt ſuch a Sum as *J. S.* ſhall value them to be worth. Defendant pleads, before ſuch a Feaſt *J. S.* did not value them. On Demur, adjudged *Pro Quer'*; for though the Covenantor hath Election to do the one, or the other, yet the Covenant being for his Bene-

fit, he ought to provide the Value ſhall be aſſeſſed, otherwiſe he is to deliver the Goods themſelves.

Covenant to pay to *A.* or his Heirs annually 12 *l.* at *Michaelmas* and *Chriſtmas*, or to pay to him or his Heirs, at any of the ſaid Feaſts, 150 *l.* The Covenantor hath Election, yet he ought to pay the 12 *l.* Yearly till he pay the 150 *l.* and becauſe he did not alledge Payment of the one, or the other, it is a Breach.

Condition of a Bond on Articles: If the Defendant paid the Money according to the Articles of the ſame Date, that then the Bond ſhould be void, or otherwiſe it ſhall and may be lawful for the Plaintiff to enter into the Land covenanted in the Articles, to be ſettled on the Plaintiff by the Defendant. Defendant pleads, the Plaintiff did enter into the Land. Plaintiff demurs. *Moreton* and *Windham* conceived this a Disjunctive Condition, and in the Election of the Defendant to perform either Part. 2 *Keb.* 103, 117. *Ferrers* and *Newton. Cur'*, Judgment *Pro Quer'. Vide* 1 *Sid.* 312. *meſme* Caſe.

Debt on Bond for Performance of Covenants: If the Defendant pleads generally the Performance of the Covenants, and the Plaintiff doth demur generally upon it, without ſhewing Cauſe of Demur, Judgment ſhall be given according to the Truth of the Caſe, for that Default of Pleading is but Matter of Form, and is aided by *Stat.* 27 *Eliz.* But if any of the Covenants be in the Disjunctive, ſo as it is in the Election of the Covenantor to do the one, or the other, then it ought to be ſpecially pleaded, and the Performance of it, for otherwiſe the Court cannot

not know what Part hath been performed. 1 *Leon.* 311. *Oglethorp* and *Hide.*

Vide Pluis, Tit. Bonds to perform Covenants, Pleadings.

Covenants in the Copulative, and in the Disjunctive.

The Covenant is, That the Defendant would not take Timber without the Aſſent or Aſſignment of the Leſſor or his Aſſigns in the Disjunctive; and in the Breach the Plaintiff chargeth the Defendant with cutting of Timber, without the Aſſent and Aſſignment of the Leſſor, or his Aſſigns; ſo he will compel the Defendant to prove more than he ought, for if he did it with their Aſſent only, or Aſſignment only, it had been ſufficient; but if the Covenant had been in the Copulative, both had been neceſſary. 1 *Leon.* 251. *Per Hob. Sherwood* and *Noun.*

Bond or Covenant, That if the Defendant ſhould work out the 40 *l.* (which he owed, *&c.*) at the uſual Prices in Packing, when the Plaintiff ſhould have occaſion for himſelf or his Friends to employ him therein, or otherwiſe ſhall pay the 40 *l.* then, *&c.* Defendant pleads, That he was always ready to have wrought out the 40 *l.* but that the Plaintiff did never employ him. It's an ill Plea, becauſe the Defendant did not aver that the Plaintiff had any Occaſion to make uſe of him, and for that it was at his Election to have Work or Money; and not having employed him, but brought his Action, that is a Requeſt in Law, and ſo he hath determined his Election to have the Money. Judgment *pro Quer'.* 2 *Mod.* 304. *Wright* and *Bull.* Election determined.

Debt on Bond of Covenants, upon the Demiſe

miſe of a Mill, by the Plaintiff's Teſtator to the Defendant for 13 Years, under 8 *l.* Rent. The Defendant covenanted for himſelf, his Executors and Adminiſtrators, to leave Mill-Stones upon the ſaid Mill at the Expiration of the aforeſaid Term, as good as when he entered, or elſe to give Satisfaction in Money for as much as they ſhall be worſe, according to the Diſcretion of the Parties that viewed the ſame at the firſt: And Defendant further pleads, *Quod ipſe ad finem & expirationem termini prædict' reliquit duo ſaxa molaria in & ſuper molendinum præd' quodq; Partes* [*Anglice*, the Parties] *quæ primo inſpiciebant ſaxa molaria que fuerunt ſuper molend' præd' tempore intrationis ipſius* Johannis *in molend' illud hucuſque non agreeavere quantum duo ſaxa præd' per ipſum ad expirationem terminis præd' ut perfertur relicta fuer' pejora quam præd' ſaxa molaria in & ſuper molendum prædict' præd' tempore intrationis ejuſdem* Johannis *ad inde*; and general Performance as to the other Covenants. *Replic'*, Demand of the Oyer of the Indenture; wherein, *inter alia*, the ſaid Covenant is ſet forth, and ſay, *Precludi non*, for that at the Time of the Entry of the Defendant upon the Mill, there were Two Stones, of the Value of 3 *l.* and that at the End of the Term the Defendant did not leave ſo good Stones, nor give any Satisfaction in Money, (*nec dedit aliquam ſatisfactionem in moneta alicui Perſone cuicunq; per tant' quant' Lapides molar' per eundem (Def.) in eodem molendino relict' fuer' pejores quam præd' Lapides molares in eod' molendino exiſten' tempore præd' Intrationis ipſis Defendentis. Et hoc parat'*, &c. Rejoinder *prout* the Bar, Demur. The Plaintiff's Council inſiſted, That it was incumbent upon the Defendant, to procure the Perſons who

who had the View of the Stones at the Time of the Defendant's Entry upon the Mill, to have adjuſted how much the Stones of the Mill, which were left at the End of the Term, were worſe than thoſe which were there at the Time of the Defendant's Entry of the Mill, and for Default thereof, he hath broken his Covenant; for he doth not pretend by his Plea, that he hath left Stones ſo good as the firſt were. The disjunctive Covenant is in Advantage of the Covenantor, and therefore he ought to ſhew the one or the other is performed, and therefore he ought to have procured an Adjuſtment in the Caſe; as if a Man oblige himſelf to reſign a Benefice, he ought to procure the Biſhop to accept his Reſignation. So if a Man is bound to pay 100 *l.* or ſo much as *J. S.* ſhall appoint, if he will be excuſed the Payment of the 100 *l.* he ought to procure *J. S.* to appoint a leſs Sum to be paid.

Disjunctive Covenant is in Advantage of the Covenantor.

To which it was anſwered by the Defendant's Council, That by the Covenant, he was to leave at the End of the Term as good Stones as were in the Mill at the Time of his Entrance, or to give Satisfaction in Money for ſo much as they were worth, according to the Diſcretion of the former Viewers of them, ſo that the Covenant is in the Disjunctive; and in a disjunctive Covenant, if one Part of it becomes impoſſible, the Covenantor is excuſed to perform the other Part, and that this Caſe is like to Submiſſion to Arbitrament: And for this the Defendant is not bound to procure the Viewers to make any Adjuſtment in the Caſe, and they having not made any, and the disjunctive Covenant being for his Advantage, he was entirely excuſed.

Per Cur', Conditions are for the Benefit of the Obligor, if poſſible; but if impoſſible, the Obligation is abſolute. There is no Impoſſibility in this Caſe, if the Viewers cannot be procured to adjuſt the Damage, yet the Defendant might have left as good Stones at the End of the Term, as were there at the Entrance of the Defendant, which is the other Part of the Covenant; and this Caſe is not like Submiſſion to Arbitrament, for by it both Parties oblige themſelves to ſtand to the Arbitrament of the Arbitrators, but none of them obligeth himſelf to procure them to make an Award. But in this Caſe the disjunctive Condition being in Advantage of the Defendant, he ought to procure the firſt Viewers to make Adjudication of the Damages.

Laughter's Caſe is good Law, 5 *Rep.* but the Reaſon given there hath been denied. If one bind himſelf to pay 10 *l.* or ſo much as *J. S.* ſhall appoint, if *J. S.* will not appoint any Sum to be paid, the Obligor ſhall pay the 10 *l.* If one is bound to make a Leaſe to *J. S.* or pay him 100 *l.* before *Michaelmas*, and *J. S.* dyes before *Michaelmas*, the 100 *l.* ought to be paid. And in the Time of *Ch. J. St. John*, a Caſe was adjudged, and Two of the Judges in it ſpake with Two of the Judges in *Laughter*'s Caſe, who affirmed, that there was not any ſuch Reaſon given for the Reſolution in *Laughter*'s Caſe. The Caſe in *St. John*'s Time was, A Man covenants, in Conſideration of 100 *l* to make a Leaſe to *J. S.* for his Life, before *Michaelmas*, or to repay the 100 *l.* and *J. S.* dyes before *Michaelmas*: Reſolved that the 100 *l.* ſhould be repaid, 1 *Lut.* 691. *Studholm and Mandall.*

Covenants

Covenants { *Affirmative.* / *Negative.*

There is Difference in penning of the Covenant; as if the Leſſor covenant with his Leſſee, that he ſhall have ſufficient Hedge-boot by Aſſignment of the Bailiff of the Leſſor: By this the Leſſee is not reſtrained from that Liberty which the Law allows him, and therefore he may take without Aſſignment; but if the Words be negative, that he ſhall not take without Aſſignment, or that he ſhall take by Aſſignment and not otherwiſe, *contra. Dier* 19.

P. brought Covenant againſt the Defendant, on Covenant that he ſhall go in ſuch a Ship out of the River of *Thames* to ſuch a Place in *Spain*, and the Words of the Covenant were, *Quod decederet procederet & non deviet.* Defendant pleads Performance generally; *per Cur'*, the Plea is not good, and this *Diverſity is taken between a negative Covenant, which is only in Affirmance of an affirmative Covenant Precedent; and a negative Covenant which is additional to an affirmative Covenant, as here; for in the firſt Caſe, Performance generally is a good Plea, but in the laſt not, but he ought to plead ſpecially; and in this Caſe the Defendant might have departed, proceeded and gone to *Africa*, or to the *Weſt-Indies*, if he had not been reſtrained by the negative Covenant, *& non deviet*, 1 *Sid.* 87. *Langhill and Palmer.*

†A negative Covenant, as that he ſhall not uſe a Trade, *in conſideratione inde*, Defendant promiſeth him 100 *l. per Annum* during Life: This doth not amount to a Condition Precedent (but is mutual), for then the Plaintiff

*Diverſity between a negative Covenant, which is only in Affirmance of an affirmative Covenant, and a negative Covenant which is additional to an affirmative Covenant.

†If the Covenant of the one Part be negative, and the affirmative Covenant of the other Part be *in conſideratione performationis inde*; tho' the negative Covenant be broken, yet the affirmative Covenant ought to be performed.

tiff ſhall never have the 100 *l per Annum* during his Life; for it is not poſſible for the Plaintiff to perform his Covenant in his Life, for at any Time during his Life he may break it; and a negative Covenant is not ſaid to be performed until it becomes impoſſible by the Breach of it, which Impoſſibility may not happen but by the Plaintiff's Death, 2 *Sand.* 155, 156. *Humlook and Blacklow.* 1 *Mod.* 64. 2 *Keeb.* 674.

Debt on Bond for Performance of Covenants; One whereof was, That the Defendant ſhould not deliver up Poſſeſſion to any but the Leſſor, or ſuch Perſons as ſhould lawfully recover. The Defendant pleads, he did not deliver but to ſuch Perſons as lawfully recovered it. *Twiſden* ſaid, he ought to ſhew he delivered to *J. S. per* lawful Title; but on the other Side it was ſaid, the Bar is purſuant to the Count; and *Twiſden* conceived in affirmative Covenants general Pleading-Performance is ſufficient, and ſo on negative; for it is ſufficient for the Defendant to plead an Excuſe, and the Plaintiff muſt aſſign Breach to entitle himſelf, *Windam ad idem.* Negative Covenants may enwarp many Particulars; as to ſay, he did not cut down any Timber, unleſs to make Bars and Stiles, Judgment *pro* Defendant, 1 *Keb.* 380, 413. *Nicholas and Pullen*, yet 2 *Palmer* 70. *Ley* ver. *Luttrell*, *al' cont. Vid. infra tit. Pleadings.*

Negative Covenants may enwarp many Particulars. 1 *Lev.* 83.

A negative Covenant is ſaid never to be performed until it becomes impoſſible to break it, 2 *Sand.* 157.

Treſpaſs *quare clauſum fregit & ſepes proſtrnavit*, by the Plaintiff Leſſee for Years. Defendants juſtifie, for that *M.* ſeiſed of the Lands let them to the Plaintiff, exceping the

Trees

Trees, and Liberty to root them up, fell them and carry them away, *cum averiis reparando ſepes & implendo foveas*; and that *M.* afterwards granted the Trees and Liberty to *Arthur*, and that he and the other Defendants, as his Servants in Proſtration, *&c.* uſed this Liberty (which is ſpecially pleaded) and juſtify *que eſt eadem fractio.* Plaintiff demurs, for that the Defendants have not alledged that they have filled up the Ditches, and amended the Fences according to the Agreement. *Per Cur'*, this is not a Condition, which not being performed, deſtroys the Agreement and avoids the Liberty; but it is a Covenant, for which the Leſſee hath Remedy by Action. And the C. Juſtice cited Sir *George Bickerſtaff*'s Caſe, which was, He covenanted with the Plaintiff that he ſhould quietly enjoy the Land demiſed, paying the Rent reſerved; and it was pleaded there, that the Plaintiff had not paid the Rent according to the Reſervation. And upon Demur it was adjudged, that the Word [paying] doth not make the Covenant conditional, but that it was a reciprocal Covenant, for which the Party may have Action, *Sir Tho. Jones*, 205. *Warren* ver. *Arthur*.

Not a Condition, but a Covenant, for which Remedy by Action.

Paying the Rent makes not the Covenant conditional.

CHAP. VIII.

Mutual and reciprocal Covenants.

IF *A.* leaſe by Indenture a Meſſuage to *B.* in *Dec.* 22 *Car.* 2. *pro* Twelve Years, and covenants with *B.* to repair it with all neceſſary Reparation before *Midſummer* following; and *B.* covenants on his Part, *Quod ab & poſt tale tempus quale* A. *repararet & emendaret præd' meſſuag' quod tunc præd* B. *ſufficient' repararet præd' meſſuag' ad omnia tempora durante termino præd'.*

præd'. In Action of Covenant by *A.* againſt *B.* for Non-reparation of the Houſe after *Midſummer*, he declares, That altho' he had performed all the Covenants on his Part to be performed (without any particular Averment) that he had repaired it before *Midſummer*, *&c.* yet the Defendant had not repaired after the ſaid Feaſt. This is a good Declaration, for the Covenant of *A.* to repair it before *Midſummer* is not a Condition Precedent, but only the Time divided and mutual between *A.* and *B.* (*ſcilicet*) that *A.* ſhall repair it before *Midſummer*, and *B.* after during the Term, for which each of them may have Remedy by Action againſt the other, 1 *Rolls Abr.* 416. *Bragg and Nightingale*, *Stiles* 140. This is a reciprocal Covenant, and tho' one does not perform his Part, it ſhall not excuſe the other.

Not a Condition Precedent, but reciprocal.

Covenant upon a Charterparty, whereby the Maſter of the Ship covenants to ſail with the firſt fair Wind to *Barcelona*, and that the Mariners ſhall attend with a Boat to relade the Ship, and then to return with the firſt fair Wind to *London*, and to unlade and deliver the Goods; and the Merchants Covenant to pay ſo much for Freight, and ſo much for Demurrage every Day. And the Maſter brought the Action for the Freight, and for Demurrage, and declares he ſailed ſuch a Day with the firſt fair Wind, and upon all the other Points. Defendant *quoad le* Freight pleads, that the Ship did not return directly to *London*, but went to *Alicant* and *Tangier* and made diverſe Deviations, and by ſuch Delays the Goods were ſpoiled. And *quoad* Demurrage, that this was occaſioned by the Negligence of the Mariners in not attending

tending with their Boat to relade the Ship. Plaintiff demurs, and had Judgment, for the Covenants are mutual and reciprocal, and each one ſhall have his Action againſt the other, but ſhall not plead the Breach of one in Bar of the other; and perhaps the Damage on the one Side and the other are not equal, *ergo* not pleadable in Bar the one of the other; but each one by his Action ſhall recover againſt the other the Damage certain for him, 3 *Lev.* 41. *Cole and Shallet.* And ſo is the Caſe of *Shower and Cudmere, Sir Thomas Jones* 216.

Breach of one Covenant, where not to be pleaded in Bar of the other.

Where in mutual Covenants the Words, *In conſideratione performationis inde*, ſhall make a Condition Precedent or not, 2 *Sand.* 156, 157. The Lord of a Mannor covenanted to aſſure the Freehold to one of his Copyholders and to his Heirs, and the Copyholder, in Conſideration of the ſame Covenant performed, promiſeth to pay a certain Sum of Money; the Copyholder is not bound to pay the Money, unleſs the Lord firſt perform his Covenant. *Aliter*, If the Covenant on the Part of the Copyholder had been in Conſideration of the Covenant to be performed, cited in *Sanders, ut ſupra.*

Where the Words [*In conſideratione inde*] ſhall make a Condition Precedent or not.

If the Covenant of the one Part be Negative, and the affirmative Covenant of the other Part be, *in conſideratione performationis inde*; altho' the negative Part is broken, yet the affirmative Covenant ought to be performed, 2 *Sand.* 156, 157.

In Aſſignment the Plaintiff declares, that he was poſſeſſed of a Term for eighty Years, and it was agreed between him and the Defendant, that he ſhould aſſign all his Intereſt therein to the Defendant, who *proinde* ſhould

pay 250 *l.* and that he promiſed, that in Conſideration that the Plaintiff at his Requeſt had likewiſe promiſed to perform all on his Part, that he would perform all on his Part; and then ſets forth, that the Defendant had paid a Guinea in Part of the ſaid 250 *l.* and that he *(viz.* the Plaintiff) *obtulit ſe* to aſſign the Premiſſes to the Defendant by Indenture, which was written and ſealed, and would have delivered it to him; but he refuſed, and aſſigns the Breach in Non-payment of the Money. Defendant demurs, for that the Aſſignment ought to precede the Payment, and that it was not a mutual Promiſe; It is that the Plaintiff is to aſſign, and the Defendant *proinde*, which is as much as to ſay, *pro aſſignatione*; like Caſe, *Colt Ughtred's Caſe*, and *Dyer* 16. *b.* But *per Cur'*, it is a mutual Promiſe, and that the Plaintiff need not to aver the Performance; and it is as reaſonable that the Plaintiff ſhould have his Money before he make the Aſſignment, as that the Defendant ſhould have the Term aſſigned before he paid the Money, 2 *Mod.* 33. *Smith and Shelberry.*

In mutual Promiſes the Defendant need not aver Performance.

It is ſaid, If one Covenant to ſerve me a Year, and I covenant to pay him 10 *l.* for it; in this Caſe, albeit he doth not ſerve me, I muſt pay him 10 *l.* for it; but if I covenant to pay him 10 *l.* if he ſerve me a Year, *contra*, for there I am not bound to pay him the Money unleſs he ſerve me a Year. So if one covenant to make new Pales, ſo as he may have the old; in this Caſe it ſeems he is not bound to make the new Pales, unleſs he may have the old ones. So if one covenant to pay Money for Service, Counſel, or the like; or covenant to marry ones Daughter, or make an Eſtate, and the Covenant is penned conditionally,

ditionally, ſo as one Thing is the Cauſe of another, and is not ſet down by mutual and reciprocal Covenants; in all theſe Caſes, if the Cauſe or Condition be not obſerved, the Covenant ſhall not be performed.

Knight and Keech, p. 3. Will. & Mar. B. R. Rot. 374. The Caſe was, There were mutual Promiſes and Agreements between the Plaintiff and Defendant, which were ſpecially ſet forth in the Declaration, in which the Plaintiff alledged generally, that the Defendant *non performavit agreeamentum ſuum prædictum*, without ſhewing a particular Breach. There was a Verdict and Judgment for the Plaintiff in the *Common-Pleas*, and now a Writ of Error brought; and it was aſſigned for Error, that the Breach was too general, which being Matter of Subſtance, the Right of the Action could not be tryed, and therefore it is not within any of the Statutes of Jeofailes. Many Caſes were put to ſhew, that *non performavit agreeamentum* could not be good, without ſhewing wherein, as *Co. El.* 292. *Hob.* 67. 2 *Cro.* 503. but Judgment was affirmed upon theſe Authorities following, *(viz.)* 3 *H.* 6. 8. *Dier* 297. Debt was brought upon a Leaſe, in which the Defendant was bound to perform ſeveral Covenants, or otherwiſe to forfeit ſo much, *&c.* The Breach aſſigned was, that he had broke all the Covenants, and did not ſhew any particular Breach, yet held good.

Non performavit agreeamentum ſuum generally, without ſhewing a particular Breach, where good.

If Promiſes are Executory on both Sides, Performance need not be averred, becauſe it is the Counter-Promiſe, and not the Performance that raiſes the Conſideration; and therefore where the Plaintiff promiſed to deliver a Cow to the Defendant, and he promiſed to pay him 50 *s.* the Plaintiff need not

not aver the Delivery of the Cow, becauſe without ſuch Averment a Promiſe againſt a Promiſe made at one and the ſame Time is a ſufficient Ground for an Action, and for a later Authority, 2 *Sand.* 351. There was an Agreement between the Plaintiff and Defendant, that the Plaintiff ſhould pull down old Walls and build a Malt-Houſe, and that the Defendant would pay him 8 *l. pro Labore ſuo*; the Plaintiff averred, that after the Agreement *parat' fuit & obtulit performare*, &c. he had a Verdict, and this was held good enough after a Verdict, without averring Performance of the Work. Upon theſe Authorities, and for that the Promiſes in this Caſe were mutual, the Breach was held to be well aſſigned, and Judgment *pro Quer.* 4 *Mod.* 188.

The Caſe of *Ware and Chappell*, cited 2 *Mod. Rep.* 75. *Ware* was to raiſe Five hundred Soldiers, and bring them to ſuch a Port, and *Chappell* was to find Shipping, for which he ſued upon the Covenant, tho' the other had not raiſed the Soldiers; for that can only be alledged in Mitigation of Damages, and is no Excuſe for the Defendant; and it was adjudged that this was not a Condition Precedent, but diſtinct and mutual Covenants, upon which ſeveral Actions might be brought, 2 *Mod.* 75. *Stiles Rep.* 186.

Not a Condition Preceedent, but diſtinct and mutual Covenants.

In Covenant upon a Charterparty, the Plaintiff declares, that it was agreed that his Ship ſhall be ready and provided with a ſufficient Crew, Tackle, *&c.* for a Voyage to *(Novellvill) in partibus trans Marinis*, upon the 12th Day of *Auguſt*, and there ſhould lade with Figs and other Merchandiſes of the Defendant's, and ſhould bring them back to

Topſall

Topſall in Com' Devon, and that the Defendant covenanted to pay 3 *l.* 15 *s.* for every Tun ſo brought, and aſſigns the Breach in Non-Payment of 112 *l.* 10 *s.* for Thirty Tun; To which the Defendant pleads, that the Ship was not ready, *&c.* the 12th of *Auguſt*, by which he loſt the Profit of his Merchandiſe. Plaintiff demurs. *Per Cur'*, the Plea is not good, for theſe are reciprocal Covenants, *& utraq; pars* hath Remedy for Non-Performance. Judgment *pro Quer'*, *Sir Tho. Jones* 216. *Shower and Cudmore.*

If by Charterparty *G.* and Three others covenant with *P.* and *C.* to let to freight a Ship, wherein they are Owners to the ſaid *P. pro uſu & ex parte* of one *B.* for a Voyage *modo & forma ſequenti. G.* and the other Three covenant with *B* that the Ship ſhall go to *Lyn* and ſhall take ſuch Freight, and then to *Yarmouth*, and from thence to *Ginchego*, and thence to return to the *Thames.* And *C.* covenants with *G.* and the other Three, that *B.* ſhall cauſe Lading to be put into the Ship at *Yarmouth*, *Ginchego*, &c. within ſo many Days, and covenants that the ſaid *B.* ſhall pay to the ſaid *G.* and the other Three *per tota transfretatione* 147 *l.* at ſuch a Day. *G.* and the other Three may have Action of Covenant againſt *C.* for the Non-Payment of the 147 *l.* without Averment of the Performance of the Covenants on their Part, for this is not a Condition Precedent, but a Covenant diſtinct of the other Part, 1 *Roll. Abr.* 414. *Gurnel and Clark.*

If in Articles of Agreement made between *A.* on the Behalf of *B.* and *C.* in which *A.* covenants, that *B.* for the Conſiderations expreſs'd in the Deed, ſhall convey certain Lands

Lands to C. in Fee, and after C. covenants on his Part, for the Conſideration aforeſaid, to pay to *B.* 160 *l.* In this Caſe, tho' *B.* doth not aſſure the Land to *C.* yet *C.* is bound to pay the Money for the Aſſurance of the Land. It is not a Condition Precedent, but a diſtinct Covenant, 1 *Rol. Abr.* 415.

Tho' the Land be not aſſured, yet he is bound to pay the Monies.

Debt upon a Deed-Poll, concerning the Purchaſe of Land made by the Defendant of the Plaintiff, where the Plaintiff declares, that by the ſaid Deed it was agreed between the Plaintiff and Defendant, that the Defendant ſhould pay to the Plaintiff ſo much Money upon ſuch a Day for the Land, which he hath not done. Defendant demurs upon the Declaration, for that the Plaintiff doth not aver that the Defendant enjoyed the Land; and where there is not a mutual Remedy, the Deed not being by Deed indented, there ought to be ſuch Averment, 1 *Rol.* 518. *Holder and Taylor.* Where Leſſee for Years covenants to repair, provided that the Leſſor find great Timber, there in Action of Covenant the Plaintiff ought to aver he offered great Timber, 5 *Rep.* 78. *Gray's Caſe.* But *per Twiſden*, Juſtice, in one Caſe, the Words were, The Plaintiff putting the Houſe in Repair, the Defendant covenanted to keep it ſo repaired, and reſolved that they were mutual Covenants, *Cr. Jac.* 645. *Slater and Stone, Stiles* 140. And in the principal Caſe it ſeemed a Covenant by it ſelf, and the Plaintiff had Judgment. But the Defendant brought a Writ of Error. Q. *Raym.* 183. *Pordage and Cole, El.* 1. *Sand.* 319. *meſme* Caſe. The Court held in the Caſe of *Pordage and Cole* to be a mutual Covenant; and if the Houſe was not conveyed before the Day, as it

Agreement to pay 20 *l.* for an Houſe, [*pro*] doth not make a Condition Precedent, but it's a mutual Covenant.

it ought to have been, the Defendant may have Action of Covenant for the Houſe; for it is to be intended, that the Plaintiff ſeals to the Defendant another Part *per* the Words [*have mutually ſet their Hands and Seals*], it was demurred upon the Declaration: Judgment *pro Quer.* and affirmed in *Cam' Scacc'* upon Error brought, 1 *Leon.* 274. *meſme* Caſe.

The Covenant was to make a Leaſe, and the Breach aſſigned in the not accepting the Indenture by the Defendant. *Per Cur'*, this is laid as a mutual Agreement that the Plaintiff ſhould demiſe; which muſt be intended as to the Defendant, that he ſhould accept. Judgment *pro Quer.*

Debt on Bond to perform Articles: The Plaintiff covenants to aſſign over his Trade to the Defendant, and that he ſhould not take away any of his Cuſtomers, and in Conſideration of Performance thereof, the Defendant covenants to pay the Plaintiff 60 *l. per Annum* for Life; and pleads, that after the Agreement the Plaintiff before any Thing done did work to *J. S.* a Cuſtomer. Plaintiff demurs, Judgment *pro Quer.* This is not a Condition Precedent, but theſe are mutual Covenants. The Plaintiff need not ſtay to wait for Performance, perhaps then he may ſtay as long as he lives; but as on Bonds of Arbitrament on *Breach, either Party hath Remedy, 2 *Keb.* 674. 1 *Mod.* 64. 1 *Sid.* 464. 2 *Sand.* 155. *Humlock and Blacklow.*

In Action on the Caſe, on Agreement that the Plaintiff pull down and build a Malt-houſe, and that the Defendant was to pay 8 *l. pro Labore*: In Conſideration of which mutual †Promiſe the Plaintiff *obtulit* to perform all on his Part, yet the Defendant had not

* On Breach either Party hath Remedy.

† Mutual Agreement, that the one ſhall build an Houſe, and the other ſhall pay 8 *l.* for the building, and ſaith he offered to build the Houſe; but ſaith not that the other hindered him.

not paid; (but he doth not ſay the Defendant refuſed the building.) Tho' this be a mutual Promiſe, yet the Contract imports that the building muſt be precedent, therefore this Refuſal ſhould be alledged, it's a mutual Covenant only; had it been to pay *poſt reparationem factam*, the Reparation had been a Condition Precedent; had the Workman agreed to build, and the other agreed to pay, they had been mutual Promiſes. But Agreement to pay 20 *l. pro Labore*, or in Conſideration of Building; theſe are precedent. Had the Suit been *pro* 8 *l.* being as a mutual Promiſe, Judgment ſhould have been *pro Quer.* and *pro Labore* alters not the Caſe; and general Performance, or *obtulit* after a Verdict, as here, implies Refuſal; and where the Agreement it ſelf makes a Condition Precedent, the Promiſe to pay it doth not alter it. Judgment *pro Quer.* 2 *Keeble* 811, 837. *Peters and Opill, vid.* Caſe, 2 *Lev.* 23. 2 *Sand.* 350. 1 *Vent.* 177.

B. Lord of a Mannor, covenants with his Copyholder to aſſure to him and his Heirs the Freehold and Inheritance of his Copyhold, and the Copyholder in Conſideration of the ſame performed did covenant to pay ſuch a Sum. *Per tot' Cur'*, the Copyholder is not tied to pay the Money before the Aſſurance made, and Covenant performed: But if the Words had been, [in Conſideration of the ſaid Covenant to be performed,] then he had been bound to pay the Money preſently, and he ſhould have his Remedy by Covenant, 2 *Leon.* 211. *Broccas's* Caſe. 3 *Leon.* 219. *m:ſme* Caſe.

Plaintiff

Plaintiff declares in Covenant, That by Indenture between him and the Defendant, reciting, that there were divers Controverſies, *&c.* for Determination whereof the ſaid Parties did by the ſaid Indenture bind themſelves, in Conſideration of 12*d.* given to each other, to obſerve the Arbitration of, *&c.* to arbitrate, *&c. de & ſuper præmiſſis,* and the Plaintiff and Defendant mutually covenanted to do ſeveral Matters. That the Arbitrator did thereupon afterwards award, and the Defendant did covenant with the Plaintiff, that in Conſideration of the Plaintiff's ſealing and delivering (at the Defendant's Requeſt) one Part of a Leaſe for Years (to the Award annexed) for the Rent therein reſerved, that the Defendant ſhould pay ſo much Money for the Tythes: It was alſo awarded by the ſaid Arbitrator, and the Defendant did covenant that he would be accountable to the Plaintiff for all ſuch Arrears of Rent, Tythes, and Compoſition-Money for Tythes, as ſhould be ariſing and renewing upon the ſaid Land, *&c.* according to ſuch a Value *per Annum,* whereof the Defendant could not lawfully diſcharge himſelf. The Plaintiff avers, he hath obſerved all the Covenants on his Part, *&c.* and aſſigns for Breach, that he hath not accounted with him for all Arrears of Tythes and Compoſition-Money, *&c.* and that he hath requeſted him to come to Account, and that he refuſed. Defendant pleads *Actio non,* and confeſſeth the Indenture; but ſaith, *in eadem Indentura ulterius agreeatum fuit & proviſum,* That the Plaintiff ſhould allow and diſcount upon the Account all Sums of Money for Parſon's Dinners at the Requeſt of the Plaintiff, and ſuch other Sums

which he had directly laid out, and that such a Day *paratus fuit & obtulit se, & adhuc paratus est*, to account for all Arrears of Rent, if the Plaintiff would discount, *&c.* and the Plaintiff refused all such Sums of Money, *&c.* Plaintiff demurs. *Per Cur'*, it's an absolute Covenant which chargeth him to be accountable, and not if the Plaintiff would allow Parsons Dinners, for it's impossible the Plaintiff can make such Allowance till the Defendant hath accounted; they are mutual and distinct Covenants, and they have each a Remedy upon these mutual Covenants; and the *provisum & agreeatum est*, doth not amount to a Condition, but is a Covenant. Judgment *pro Quer.* 2 *Mod.* 73. *Dr. Samways* versus *Eldsby*.

Mutual Covenants, and why.

Upon mutual Promises you need not to aver Performance, and an ill Averment of that which need not be averred, hurteth not, 1 *Lev.* 293. vide *Pordage and Cole*, 2 *Keb.* 542.

Averment.

In the Case of *Thorp and Thorp*, the Declaration was upon mutual Promises of Agreement, by which the Plaintiff agrees to release to the Defendant his Equity of Redemption in Two Closes; in Consideration of which the Defendant assumes to pay to the Plaintiff 7 *l.* Now the making of the Release, is a Condition Precedent to the Payment of the Money.

Mutual Covenants and Promises.

The Books vary much, where in Action of Covenant Averment of Performance need to be alledged, and where Promise may be pleaded against Promise, and where each must bring his Action; and therefore the Point is well settled in the said Case.

Where and in what Cases Averment of Performance need to be pleaded.

The Caſe of *Nichols and Rainbred* was agreed, *Hob.* 88. to be good Law. There, in Conſideration that *Nichols* promiſed to deliver to the Defendant a Cow, the Defendant promiſed to deliver to him 50 *s.* it was adjudged that the Plaintiff need not aver the Delivery of the Cow, becauſe there was Promiſe for Promiſe. It's generally true, where there are mutual Promiſes it need not alledge Performance on the Part of the Paintiff, but then it depends upon the Words of the Agreement, whether it ſhall be ſo or not; and certainly one may make the Agreement, ſo that one ſhall not be bound to part with his Money until he had a Conſideration for it, 15 *H.* 7. 10. is full as to the Words of Agreement. One covenants to ſerve me for a Year, and I covenant to give him 20 *l.* he may ſue for the 20 *l.* altho' he doth not ſerve me; otherwiſe if the Agreement had been, that he ſhould have 20 *l.* if he would ſerve me for an Year.

There is no Reaſon that one ſhall be compelled to pay Money for Performance of an Act before the Act be done; but here the enſuing Differences are to be noted:

Diverſities.

Firſt, If by the Agreement a Day certain be appointed for Payment of the Money, and this Day happens before the Act can be performed, for which the Money is to be paid; there, altho' the Words are, that one ſhall pay ſo much for the Performance of ſuch an Act by the other, yet the Party may have an Action for the Money after the Day appointed for the Payment of it, and before the Act be done; as Sir *Ralph Pooles* cited in 7 *Rep.* in *Ughtred*'s Caſe: One covenants to ſerve the other in the Wars of *France* with

3 Eſquires, and the other covenants for this to pay 42 Marks; Action lies before the Service performed. So 1 *Vent.* 147. *Lary, and Cheſhire's Caſe.* One promiſeth, that in Conſideration the other will permit him to enjoy ſuch Land for Seven Years, that he will pay him 20 *l. pro quolibet Anno,* an Action lies after every Year. Upon the ſame Reaſon is the Caſe of *Pordage and Cole,* 1 *Sand.* 319. where it was agreed, that *Cole* ſhould give to *Pordage* 500 *l.* for all his Land, the Money to be paid a Week after *Midſummer,* and adjudged that Action lies for the Money before that the Land is conveyed.

The other Difference to be obſerved is, That if a certain Day be appointed by the Agreement, yet if this Day happens after that the Conſideration is to be performed, there ought to be Averment that the Service is performed, *Dyer* 76. If a Contract be made between Two, that for an Hawk of the one to be delivered at ſuch a Day, the other ſhall have his Horſe at *Chriſtmas*; if the Hawk be not delivered at the Day, the other ſhall not have Action for the Horſe. There are divers Opinions in the Books upon that which is ſaid in *Ughtred's* Caſe, which ſeems to be contrary, and which I ſhall give Anſwer to.

1 *Rol. Abr.* 414. *Gurnel and Clarks in B. C.* Where one covenants with another to pay him 147 *l. per tota transfretatione* of a certain Freight, and it was adjudged that an Action lies for the Money without Averment of Performance on the other Part, *&c.* But in this Caſe, it appears not whether the Money was to be paid before the Voyage or after; but the true Anſwer to this Caſe is, That a Writ of Error was brought upon this Judgment, and

and the Court of *B. R.* held it to be erroneous, 1 *Bulſt.* 167.

As to *Vivian and Shippings*, in 1 *Rol.* 415. An Award was made between *A.* and *B.* that *A.* ſhould pay *B.* 10 *l.* and *in conſideratione inde B.* ſhall enter into a Bond to *A.* to releaſe all his Right in certain Lands (juſt the principal Caſe); *B.* is bound to enter into the Bond, altho' *A.* doth not pay to him the 10 *l.* *Reſp.* He is miſtaken in the Report of this Caſe, and the Judgment was directly contrary, as appears, 1 *Cr.* 384. where *Jones and Berkly contra Crok.* That the Payment of the 10 *l.* is a Precedent Condition; the Caſe of *Heys* and *Heys*, cited in *Rolls*, has no ſuch Point, as you may ſee in 1 *Cr.* 433.

There is a Caſe in 2 *Mod. Smith and Shelden, p.* 33. The Plaintiff declares, That in Conſideration that he promiſed to aſſign his Intereſt in ſuch an Houſe, the Defendant promiſed to pay him ſo much, *&c.* The Queſtion was, Whether the Plaintiff ought to aver, that he had aſſigned his Intereſt in the Houſe; and it was ruled, that he need not make ſuch Averment.

This was adjudged in a Writ of Error, *Hill.* 8 *W.* 3. *Rol.* 1667.

Tenant to have convenient Timber for Reparations, by the Appointment of the Bayliff.

Conſtruction.

Treſpaſs upon a Leaſe of a Farm during Lives, and the Covenant upon which the Queſtion aroſe was this: The [Defendants] covenant, *que* J. W. and *Jane* his Wife, and W. W. *eorum filius deberent & vellent de tempore in tempus & ad omnium tempora*, &c. *bene &*

ſufficient' reparare, &c. *dict' tenement' horrea*, &c. *in bon' & ſufficient' reparatione pro quo propoſito* [*Angl'*, for which Purpoſe] *liceret & licit' foret pro eo ea vel illis capere ſuper dicta præmiſſa per appunctuationem & non aliter ballivi dict' manerii pro tempore exiſten' ſuper raconabil' requiſition' fore fact' apt' convenien' maremium* [*Angl'*, fit convenient Timber] *pro reparatione dict' meſſuag' & edificiorum ſi aliquod tale maremium heri' vel inveniri poſſet ſuper dicta præmiſſa.*

(The Treſpaſs was, for cutting down Six Oaks and Six Elms. Defendant juſtify all, except Five Oaks and Five Elms by Vertue of the Leaſe by the Plaintiff to them, and recite the Leaſe and the ſaid Covenant).

That the Houſe was in Decay, &c.

Virtute cujus dimiſſionis præd' (Defendant) *in præd' meſ' intravere & ſic ſeit' exiſten' præd' meſ' & alia edificia per Indentur' præd' ut prefertur dimiſſ' fuer' in decaſu in maremio eorundem & neceſſar' reparationibus indigebant videl' apud S. præd' ſuper quo poſtea ſcil' (tale Die & Anno) apud S. præd' quidam* R. W. *tunc exiſten' ballivus præd' Johannis Talbot* (Leſſor) *manerii ſui de S. præd' ad requiſitionem ipſorum* (Defendants) *appunctuavit præd' les Deft' ſuccidere & capere apt' & convenien' maremium ad præd' neceſſar' reparationes faciend' virtute cujus quidem appunctuationis præd' les* (Defendant) *& ac præd' O. O. C. D. & ut ſervientes (des Deft') ac per eorum precept' die & ann' ſupradict' in narratione præd' ſpec' apud S. præd' quinque Quercus & quinque Ulmos in & ſuper præd' dimiſſ' præmiſſ' creſcen' & exiſten' apt' & convenien' maremium & ſufficien' tantum ad neceſſar' reparation' præd' faciend' & non amplius pro eiſdem neceſſar' reparationibus ſuocider' ceper' & aſportaver' prout eis bene licuit* [and that Part of them was employed upon the Reparation, and that the Reſidue, *quam cit' potuer' ſcil'*

That *R. W.* the Bayliff, *&c.* at their Requeſt appointed them to cut down apt and convenient Timber, *&c.* and ſo juſtify being neceſſary for Reparation.

uti

uti ad tunc & ibid' progrediebant quoſq; præd' Johannis Talbot operarios prohibuit, &c.] & hoc parat'.

Replic' precludi non, quia de injuria ſua propria abſq; hoc quod præd' R. W. ballivus præd' Johannis Talbot manerii ſui de S. præd' ut prefertur exiſten' appunctuavit præd' Janam W. & J. ſuccidere & capere eaſdem quinque Quercus & quinque Ulmos ad reparation' faciend' & hoc parat', &c. unde, &c. Demurr' pro cauſa traverſat materiam non traverſibilem & non ſatis apte reſpond' materiæ plitat. De injuria ſua propria. Demur.

Per Cur', the Traverſe is ill, for by it is travers'd what is not alledged in the Plea; for the Traverſe is, That the Bayliff had appointed the Defendant [Tenant of the Premiſſes] *ſuccidere eaſdem quinque Quercus & quinque Ulmos.* And the Plea is, That he had appointed them *ſuccidere & capere aptum & convenien' maremium*, &c. Here is a Traverſe of a Concluſion, which ought not to be; the Traverſe ought to have been, That the Bayliff did not make any Appointment, or that the Trees were not neceſſary or convenient.

As to the Plea: It was ſaid, That when Trees are excepted in a Leaſe (as they are in this Caſe) and by the Leaſe a ſpecial Authority is given to the Tenant to take the Trees for Reparations, there the Tenant ought to purſue the Authority given to him, or otherwiſe he is a Treſpaſſer; but if the Leaſe is made without any Exception of Trees, then if the Bayliff will not make any Appointment, the Tenant may reſort to the general Authority given him by the Law to take that which is convenient. And *J. Powell* ſaid, that perhaps it was not neceſſary for

the

the Bayliff in this Caſe to appoint the particular Trees for the Reparations, but he ought to have view'd the Buildings, and upon this to appoint ſo many Trees for the Reparation of them. C. J. *Treby*; What is not covenient is not to be left to the Judgment of the Tenant; at the Rate of this Appointment the Tenant may take as many as he pleaſeth, for the Bayliff had made him Judge of it contrary to the expreſs Words of the Covenant, which are, That the Tenant ſhall have convenient Timber, *&c.* by the Appointment of the Bayliff, and not otherwiſe. The Bayliff had not executed his Authority, and then the Defendant cannot have any Authority, and ſo are Treſpaſſers; and by the Opinion of the whole Court, Judgment was pronounced *pro* Plaintiff, becauſe the Bar was ill, 1 *Lut.* 1471. *Sir John Talbot* ver. *Jane Woodhouſe & al.*

CHAP. IX.

Where the Covenants are diſtinct or not.

IF *A.* upon a Marriage intended by *C.* his Son with *D.* covenants with *D.* to ſtand ſeiſed, and to make other Coveyance of Land to the Uſe of *C.* for Life, and after to *B.* for her Jointure for Life, and after to other Uſes of their Iſſues, and ſo of other Lands, as before, and then *A.* covenants *modo & forma ſequentibus*, (viz.) *præd'* A. *pro & non obſtante aliquo actu ſive re per ipſum facto in contrarium tempore ſigillationis & deliberationis Indenturæ præd' ſtabat' & legitime fuit ſeitus ac uſq; tales bonæ & ſufficientes conveyanciæ & aſſuranciæ in Lege forent factæ & Legitime Executæ ut ſupradict' eſt ſtetteret & eſſet ſeitus de præmiſſis ſibi & hæridibus ſuis in feodo ſimplici abſq; aliquo genere* [*Anglice*, Manner,

Manner, Condition, Defeaſance, Mortgage, Limitation,] *ſive poteſtatis Revocationis mutare permutare eadem ac inſuper quod dicta terra & præmiſſa præd' antea Limitata pro junctura dictæ* B. *a tempore deceſſus præd'* A. *pro & durante termino vitæ dictæ* B. *continuarent remanerent & forent eid'* B. *& aſſignat' ſuis plene & clare annue valoris* 200 l. *ultra & præter omnia onera ſolution' exitus & repriſas quocunq;* and that no Reverſion was then in the King. Altho' in this Caſe this bears Semblance to be one Covenant, for that the Words of Covenant are but once named; and altho' it be ſaid in the Beginning, he covenants in Manner enſuing; and altho' the Word [*Et*] couples altogether, yet the laſt Part touching the Value, is an abſolute, ſeveral, diſtinct Covenant of it ſelf; ſo that if the Land limited for the Jointure are not of the Value of 200 *l. per annum*, altho' it is not *per* any Act of her own, yet he had forfeited his Covenant; and the Words [notwithſtanding any Act] do not refer to the ſaid Covenant, but only to the firſt, and the Value is properly in the Coniſance of the Covenantor; and it is not proper to ſay, that for any Thing by him, *&c.* it ſhould be of ſuch a Value, *Cr. Car.* 495. *Hughes and Bennet. Jones* 403. Vid. *Cr. Car.* 107. *Et* 1 *Baud.* 60. 2 *Rolls Abr.* 249. *meſme* Caſe.

Notwithſtanding any Act, how refer or not.

In a Feoffment the Teſtator covenants, That notwithſtanding any Thing by him done to the contrary, he was ſeiſed in Fee-Simple or Fee-Tail, without any Condition or Limitation to determine it. And (2.) That he had Power and rightful Authority to ſell. (3.) That the Lands were clear from all Incumbrances. And, (4.) That the Feoffee ſhall

Notwithſtanding any Thing by him done to the contrary.

ſhall enjoy againſt all Perſons claiming under him, his Father and Grandfather.

Plaintiff declares, that the Teſtator had not Power to ſell the Land. Defendant pleads, that the Teſtator, notwithſtanding any Thing done by him, had Power to ſell the Land. Plaintiff Demurs. By Three Juſtices againſt *North*: Though the Covenants are diſtinct, yet the firſt Two are *Synonyma* and of the ſame Nature, for if he is ſeiſed in Fee he had Power to ſell, and it may not be intended, that when by his firſt Covenant he covenants againſt his own Act, that immediately by another Covenant of the ſame Effect he ſhould covenant againſt all the World; and the Two ſubſequent Covenants here are particular and limited, and therefore the middle Covenant ſhall not be more indefinite and general. But *North* held this abſolute and not limited, by Things made by him in the firſt Covenant, or by him, his Father or Grandfather: As, 1 *Cro. Crayford's* Caſe; Covenant, That notwithſtanding any Thing done by him he was ſeiſed in Fee; and that no Reverſion was in the Crown, and it was of the yearly Value of 300 *l.* each one is diſtinct and abſolute, 3 *Lev.* 46. *Nervin and Muns* verſus *Executors of Finery, Trin.* 33 *Car.* 2. *B. C. Rot.* 368.

Where Covenants are diſtinct, and where *Synonyma*.

Debt on Bond, conditioned for performance of Covenants. Defendant demurr'd *Oyer* of the Condition, and pleads Performance; the Covenants were, That *T. B.* Son of *W. B.* ſhould eſpouſe *A.* the Daughter of *M.* and in Conſideration of this Marriage, *M.* covenants to pay 300 *l.* *W. B.* covenants to aſſure ſuch Lands to the ſaid *T. B.* and *A.* for her Jointure, and other covenant for quiet

quiet Enjoyment, *&c.* And amongſt others, *M.* covenants that he will procure the ſaid *T. B.* to be preſented, admitted, inſtituted and inducted into ſuch a Benefice upon the the next Avoidance of the ſaid Church, which he did not perform. Defendant demurs upon this Breach aſſigned, becauſe the Covenant is againſt Law, being a Simoniacal Agreement: But *per Cur'*, if it had appeared to have been, that in Conſideration of the ſaid Marriage, *&c.* he would procure him to be preſented, *&c.* it had been a Simoniacal Contract, and had avoided the Obligation; but this Covenant depends not on the former Covenants, but a diſtinct Covenant by it ſelf, and without ſpecial Averment, or ſhewing that it was a Simoniacal Contract, it ſhall not be intended, *Cr. Car* 425. *Byrt and Manning.* A diſtinct Covenant.

Covenant that he would from Time to Time during the Term, after Three Months Warning, ſufficiently repair, and at the End of the Term leave it ſufficiently repaired to the Leſſor. The laſt Clauſe is diſtinct by it ſelf, he muſt leave it ſufficiently repaired without Notice, 2 *Keb.* 505, 543, 569. *Pomfrett and Rycroft*, 1 *Sid.* 429. 1 *Sand.* 321.

A Man aſſigns a Leaſe for Years, and covenants that he had not made any former Grant, or any Thing by which this Leaſe may be in any Manner fruſtrate, [but that] the Aſſignee and his Executors by Vertue of this Grant and Aſſignment may quietly enjoy the Premiſſes during the Term, without Diſturbance of him or of any Perſon. By Three Juſtices againſt one; theſe Words [but that, *&c.*] depend upon the former Words, and is not new Matter or Sentence; and therefore the Entry of a Stranger by Eigne [But that, *&c.*] make no new Matter.

Eigne Title had not broken the Covenant; *Dyer* 240. *Pl.* 43. So if the Wife of the Leſſor had recovered Dower.

In Covenant on Aſſignment of an Oligation of *Holl* to the Teſtator of the Plaintiff, and to give a Letter of Attorney to the Defendant to ſue, and not to revoke. The Defendant covenants to give Bond to pay 100 *l.* within a Year, and 400 *l.* after. The Defendant pleads, the latter Covenant was made in Conſideration of the Aſſignment, and that the Plaintiff hath aſſigned. Plaintiff demurs, becauſe theſe are ſeveral Covenants; and this is an Averment *Debors. Per Cur'*, ſeveral Covenants or Aſſumpſits are always in Conſideration one of another, yet being diſtinct, one is no Bar of another. Judgment *pro Quer'*, 3 *Keb.* 352. *Johnſon and Palgrave.*

Diſtinct Covenants, one no Bar to the other.

Covenant that he is ſeiſed in Fee, &c. had Authority to ſell, &c. Whether ſeveral or diſtinct Covenants?

J. and *P.* enfeoff the Plaintiff of Lands, and they covenant in Manner following, (*viz.*) *That* J. *is ſeiſed of a good indefeaſible Eſtate in Fee-Simple in this Land, and that he or* P. *had a good Authority to ſell, and that there is not any Reverſion in the Crown by any Act done by* J. *or* P. *or either of them.* The Qu. was, Whether theſe Words [by any Act] ſhall refer to all before, or to this laſt Part only, the Two firſt Covenants being in the Affirmative, and the laſt in the Negative, as is *Ersfeild* and *Napper*'s Caſe? *Per Cur'*, they are ſeveral Covenants, *Lit. Rep.* 62, 65, 185, 203, 80. *Sir George Trenchard* verſus *Hoskins*, 1 *Sid.* 328. *Gamford* verſus *Griffith.* In Covenant, that the Leaſe aſſigned to the Plaintiff was

a ſure and indefeaſible Leaſe, and that the Plaintiff ſhould quietly enjoy without the Let, Trouble or Interruption by him; and on Performance pleaded, the Plaintiff aſſigns a Breach by Entry of a Stranger, to which the Defendant rejoined, it was by Diſſeiſin; and whether this was one entire Covenant or not, was the Queſtion. *Per Cur'*, the latter Words cannot qualify the former, they not being Senſe joined together: As on Covenant that the Land is of a certain Value, and that the Covenantee ſhall enjoy it notwithſtanding any Act done by him; this can never be applied to the former Part of the Value. So here the Demiſe was made before the Aſſignment, and the Aſſignor had nothing to do with it, therefore the ſaying that the Plaintiff ſhould enjoy it without the Let of the Defendant, doth not affect the former Part: So was Dr. *Caldecott's* Caſe, who purchaſed Biſhop's Land of the Lord *Saliſbury*, with juſt ſuch a Covenant, and he had Relief in *Chancery* thereupon, becauſe the Intent was only to make good his own Aſſignment, not the original Title. But *per Cur'*, had the Words been, to enjoy notwithſtanding any Act, that ſhould have gone to the whole, *Gainsford and Griffith*, 2 *Keb.* 76, 201, 213. 1 *Sand.* 58. 1 *Sid.* 328.

Upon a Conveyance, the Bargainor and his Son, for them and their Heirs, did covenant and grant to and with the Bargainee, *&c.* that they the ſaid Bargainor and his Son, according to the true Meaning of the ſaid Indenture, were ſeiſed of a good Eſtate in Fee-Simple, and that the ſaid Bargainor and his Son, or one of them, have a good Authority to ſell according to the true Intent of the ſaid

ſaid Indenture; and that there was no Reverſion in the King by any Act or Acts, Thing or Things, done by him or them. Juſtice *Hob.* ſeemed to hold, that they are all one Covenant, and that theſe Words [by any Act or Acts done by them] do relate to the other Two precedent Sentences; for if theſe Words had begun the Sentence, it had been clear, and why not ſo now? *Hutton* and *Winch* held, they were Three ſeveral Covenants. *Hob.* agreed, they were ſeveral Covenants in Point of Fact, but not in Point of Obligation, there being not ſeveral Words of Binding, *in Com. B. Winch, Treachard and Hoskins.* It ſeems, that one more of the Judges came over, for it is ſaid, the Judgment was reverſed in *B. R.* and that they were ſeveral Covenants, and one independant on the other, according to *Rolls* 2 *Abr.* 250.

If I covenant that I have a lawful Right to grant, and that you ſhall enjoy notwithſtanding any claiming under me: Theſe are Two ſeveral Covenants, and the Firſt is general, not qualified by the Second; one Covenant goes to the Title, and the other to the Poſſeſſion, by *Hales and Wild*, 1 *Mod.* 101. *Norman and Foſter.*

Covenant was, that he had good Right. Plaintiff ſaith, he had no good Right. Defendant ſaith, that the Covenant was *ulterius*, that the Son ſhould enjoy it, notwithſtanding any Act done by the Father, and that he did no Act. This latter Covenant doth reſtrain the former, it is pleaded to be in the ſame Indenture, all the Parts whereof ſhall be taken together, as *Nokes's Caſe*, 4 *Rep.* 81. and the Particular ſhall qualify the General. That

Where a latter Covenant doth reſtrain a former.

Covenant

Covenant being, that the Covenantor *tantummodo warrantizaret.* And they need not ſet forth the Indenture, for it is confeſs'd by the Demurrer, and the Plaintiff deſired Leave to diſcontinue, 1 *Keb.* 234. *Brownlow's Caſe,* 1 *Levinz* 57.

Sir *George Trenchard's Caſe* was reverſed in *Exchequer Chamber.* If a Conveyance of Land be made by *A.* to *B.* if *A.* covenant that he is ſeiſed of a good and indefeaſible Eſtate in Fee, and that he had good Power to convey it to *B.* according to the Indenture, notwithſtanding any Act done by him: This laſt Clauſe and Covenant ſhall not reſtrain the firſt Clauſe of the Covenant, (*viz.*) that he had a good and indefeaſible Eſtate in Fee, notwithſtanding any Act done by him; but this is abſolute and general. And the general Uſe of Conveyance is to make it ſo, and the one Covenant independent on the other, 2 *Rol. Abr.* 250. *Sir George Trenchard and Hoſkins.*

Several Covenants or Aſſumpſits are always in Conſideration one of another, yet being diſtinct, one is no Bar of another, 3 *Keb.* 352.

In diſtinct Covenants, one no bar of another.

Sir *Tho. Jones* 150. *Kingdon* verſus *Viſc. Renalaugh* and Five others. Plaintiff, as Adminiſtrator to her Husband, brought Covenant in *B. C.* againſt the Defendant, and declares upon an Indenture of Nine Parts between the Defendant and her Husband and others, reciting another Deed by *King Char.* 2. for the farming the Revenue in *Ireland* to the Defendants, and the Inteſtate upon farming of which Land all Perſons had advanced great Sums of Money, and amongſt others the Inteſtate the Sum of 2950 *l.* And upon this (amongſt

other Covenants) it was agreed, that if any of the Parties died within the Term granted by the King, the Intereſt ſhould ſurvive and reſt in the Survivors, and that the Executors or Adminiſtrators of the Party dying ſhall not have any Benefit or Loſs by the Farm after the Death of the Party dying, but that the Survivors ſhould pay to the Executors or Adminiſtrators of the Deceas'd his Share with Intereſt, and for the Non-payment of the Share, Breach aſſigned. Defendants confeſs'd the Covenant as alledg'd, but plead further, that in the Articles there is a Proviſo, that the Parties ſhall not alien, without the Conſent of Four of the Partners, their Share or Benefit of the Contract, and then ſhews that the Inteſtate, with the Conſent of Five of them, aliened his Share, *&c.* to *J. S.* ſo that by the Death of the Inteſtate, *Pars proportio ſeu Intereſſe* of the Inteſtate did not come to the Defendants by Survivorſhip. Plaintiff demurs, and Judgment againſt him. The Qu. in *B. C.* was, Whether the Aſſignment pleaded by the Defendants, was an Aſſignment within the Intention of the Covenants or not? And *per Cur'*, it was. Error was brought in *B. R.* and the Error aſſigned there was, that the Benefit of the Contract was not aſſignable, as being meerly a Thing in Action. *Per Maynard*; Here is an Agreement for an Aſſignment Conventual, as of a Share in the *Eaſt-India* Company. It is a good Covenant in Law, and ſuch an Aſſignment which may be (*Videlicet*) an Aſſignment in Equity, is by this prohibited without Licence; but another Qu. was, Whether the Action ought to be brought againſt all? Payment out of the Treaſury, may not be made but by all, *Pemb.* C. J.

Aſſignment of a Chaſe in Action good in Equity.

C. J. the Words [if any dye, &c.] beginning a new Covenant and depends not on the former; and if ſo, then it is clear the Action ought to be brought againſt all, as it is, Sir *Tho. Jones* 150. *Raym.* 459.

A Covenant not depending on the former.

CHAP. X.

Covenants joint, or ſeveral.

IF the Merchants in a Charterparty covenant with the Owners *ſeparatim*, That one Merchant ſhall pay 3*l.* and another Merchant 3 *l.* and *ſic de cæteris*; but the Words are [*Conveniunt Separatim*]. And in the End there is ſuch a Clauſe, *Et ad performationem omnium & ſingulorum Conventionum ex parte prædictorum Mercatorum perimplend' quilibet Mercatorum prædictorum ſeparatim obligat præfat' ſeipſum Magiſtro & Proprietariis*, in double the Freight. In this Caſe, the ſaid Covenants are ſeveral by the Words [*Conveniunt Separatim*,] and the laſt Part by which *quilibet eor' obligat' ſeipſum*, &c. refers to the precedent Covenant, where they *Conveniunt Separatim*; and ſo it is alſo ſeveral, 5 *Rep.* 22. *Mathewſon's Caſe.* Tho' the Covenants of the Maſters and Owners were joint, yet the Covenants of the Merchants were ſeveral; therefore if any of the Sales of the Merchants be broken off, this only avoids the Deed unto him.

[*Conveniunt Separatim.*]

If in an Indenture there are Three of the one Part, and Two of the other Part, in which the Two covenant jointly and ſeverally to do a certain Thing; and the Three covenant alſo jointly and ſeverally with the Two, after the Performance of the ſaid Thing by the Two, to pay to the ſaid Two a certain Sum for every Particular, &c. And after, theſe general Words follow (*videlt'*) *pro*

vera & reali performatione omnium Articulorum & Agreementorum prædictorum alternatim utraq; pretium prædictarum obligavit ſe Heredes, Executores, Adminiſtratores & Aſſignatis ſuis in & ſubter penalitatem Sexagint' librarum Sterlingorum. The Queſtion was, Whether in an Action of Debt upon this laſt Clauſe for the 60 *l.* the Action may be brought againſt One of the ſaid Three only? (*ſcil'*) Whether this be joint and ſeveral as well as the Covenant? *Trin.* 1652, Judgment was given againſt the Plaintiff, (to wit) that this Covenant was joint, and not ſeveral, againſt the Opinion of *Rolls*, by Three Judges, 2 *Rol. Abr.* 149. *Linn and Harris.* The Covenant is joint and ſeveral, in as much as the Subject Matter is joint, (*viz.*) the Freight of the Ship, for and by them all; and the ſaid Words [for every of them] to refer to the Words [ſeverally covenant,] and the firſt Word [*viz.* themſelves] make it joint.

Joint, and not ſeveral, Qu.

The Plaintiffs declare, that by Indenture Tripartite, made between *T.* of the Firſt Part, the Defendant of the ſecond Part, and *C.* the Plaintiff's Teſtator of the Third Part; (on Contract with the Lords Commiſſioners for buying all Prize Brandies which ſhould be condemned by the Admiralty,) and it was declared, that all the Parties had an equal Intereſt in the Contract: *Et ſuperinde quilibet eorum reſpective pro ſe Executoribus & Adminiſtratoribus ſuis, & pro ejus proprio actu ſive actis, & pro tanto quant ad ejus proprium officium* [*Anglice*, Duty] *attinebat ſed non pro actu ſive officio alterius convenit & agreeavit ad & cum altero & alteris eorum reſpectivum, & ejus & eorum reſpectivum Executoribus & Adminiſtratoribus*, &c. *per eadem Indent' modo & forma ſequent'.* That

6000 *l.*

6000 *l.* Stock ſhould be put into a Goldſmith's Hands. That all the Prize Brandies ſhould be bought by them in Partnerſhip upon their joynt Account. That none of the Parties (during the Time of Partnerſhip) ſhall ſell or trade in Brandy Wines, by himſelf only, or in Company with any other; but only upon the ſame joint Account. That the Monies received by any of the Parties ſhall be paid in to the Goldſmith, no Advantage of Succeſſorſhip, and Account to be given to the Executors, *&c.* Breach, That the Defendant, during the Partnerſhip, without the Aſſent of *T.* and C. ſold Seventy Tuns of Brandy which came to his Hands, *Virtute contract præd'*, to Perſons not known to the Plaintiffs. 2. That the Defendant had merchandized and traded with Two hundred Tuns of Brandy, *pro computo ſuo proprio & non pro junctо computo pertinet ad Indenturam præd', contra formam & effectum Indenturam præd'.* 3. That he had received ſeveral Sums of Money, and had not paid them into the Goldſmith. 4. That he had not given Account to the Plaintiff's Executors, *&c.* Upon Judgment by Default, Writ of Enquiry of Damages awarded, and Damages entirely aſſeſſed. Exceptions to the Declaration upon the 2d Breach, becauſe he ſhews not whether the ſaid Two hundred Tuns of Brandy were Prize Brandy, received upon the joint Account, or others, for the Defendant might trade with Brandy Wines upon his own Account, and this ought to be ſhewed in particular; for if they were Prize Brandies, then Part of it is compriſed within the firſt Breach of ſelling Seventy Tun; and ſo for this Incertainty, the Damages being entirely aſ-

seis'd, it's ill. 2. The Covenant is joint with the Plaintiff's Testator, and with the said *T.* who survived the Plaintiff's Testator; for tho' the Covenant is joint and several in the Words, yet the Interest and Cause of Action is only joint, for it's equal Damage to *C.* and *T.* if the Covenants be broken, and so they ought to have joined in the Action; and *C.* being dead, the Action survives to *T.* as in 5 *Rep.* 18 *b. Slingsby's* Case. *Per Cur'*, the Declaration ill for both Points, 1 *Sand.* 154, 155. Conveyance of a Rectory to Two, and covenants with them [*Et eorum altero,*] that the Covenantor was *Legitimè seisitus* of the Rectory; they both ought to join in the Action, because the Interest of the Covenantees is joint, 1 *Sand.* 153. 5 *Rep.* 18 *b.*

Joint Interest makes a joint Covenant.

Indenture Tripartite was between Three. *A.* was one of them, and he covenanted with them [*Et quolibet eorum;*] and the Covenant was, That the Land which he had aliened to one of them was discharged of all Incumbrances; and he to whom the Alienation or Limitation of the Land was, brought Covenant sole: *Per Cur'*, it ought to be brought by both. The Covenant was with *F. G.* and *F. W.* [*Et cum quolibet eorum,*] these Words do not make the Covenant to be several, so is *Beckwith's Case*, 5 *Rep.* One covenants with Four, that he was lawfully and sole seised of the Rectory of *A.* and Two of the Four bring the Action of Covenant; and the Opinion of the Court was, that it lies not, for the other Covenantees ought to have joined notwithstanding these Words, [*Et ad & cum quolibet eorum;*] and as to these Words, this Diversity was agreed in *Slingsby's Case*, 5 *Rep.* When it appears by the Covenant, that every

Covenant with them [*Et quolibet eorum.*]

Diversity where the Words [*Et cum quolibet eorum*] make the Covenant several or not,

of

of the Covenantees hath, or is to have ſeveral Intereſt or Eſtate: Theſe Words, *Et cum quolibet eorum*, make the Covenant ſeveral, in reſpect of their ſeveral Intereſts. As if a Man by Indenture demiſe to *A. Blackacre*, to *B. Whiteacre*, and to *C. Greenacre*, and covenants with them, [*Et quolibet eorum*] that he is lawful Owner of all the ſaid Acres; in this Caſe, by theſe Words, [*Et quolibet eorum*] the Covenant is made ſeveral; but if he demiſe the Acres to them jointly, then theſe Words [*Et cum quolibet eorum*] are void; for a Man by his Covenant (unleſs in reſpect of ſeveral Intereſts) may not make this firſt joint, and then to make it ſeveral by theſe or other Words. And altho' divers Perſons may bind themſelves, [*Et quemlibet eorum*] and ſo the Obligation ſhall be joint or ſeveral at the Election of the Obligee; yet a Man may not bind himſelf to Three, and to every of them to make it joint or ſeveral, at the Election of the ſeveral Perſons for one and the ſame Cauſe, for the Court ſhould be in Doubt for which of them to give Judgment, 5 *Rep.* 18, 19. And to this Purpoſe, and for the ſame Reaſon, it's ſaid in Juſtice *Windham's Caſe*, 5 *Rep.* Joint Words of the Parties in Conſtruction of Law, ſhall be taken ſeverally and reſpectively. 1. Sometimes in reſpect of the ſeveral Intereſts of the Grantors, as if Two Tenants in Common join in a Grant of one Rent-Charge, this is ſeveral. 2. Sometimes in reſpect of the ſeveral Intereſts of the Grantees, as a joint Covenant ſhall be taken ſeverally, in reſpect of the joint Intereſt of the Covenantees.

Where joint Words ſhall be taken ſeverally.

The Defendant covenanted, that he would not agree to take the Farm of the Exciſe for the County of *York*, without the Conſent of the Plaintiff and another. The Plaintiff alone brought this Action; and the Breach was, that he did agree to take it without his Conſent, and 1000 *l.* Damages given by Verdict. *Per Cur'*, here is no joint Intereſt, but that each of the Covenantees might maintain an Action for his particular Damages: *Vid.* 2 *Mod. Rep.* 82.

No joint Intereſt.

Covenant upon a Charterparty, between *Bolton* Owner, and *Lee and Morgan* Merchants, Freighters of a Ship, by which *Bolton* put to freight to them the Ship in a Voyage to *Guiney*, at 48 *l. per* Month, and there were mutual Covenants between the Parties, (*Et quemlibet eorum modo ſequent'*, &c.) Exception was taken to the Declaration, becauſe the Action is brought againſt one of the Merchants, only upon Breach of a Covenant, omitting the other; and the Covenant is between the Parties by mutual Covenant. And the Covenant by them, [*Et quemlibet*] doth not make it Diſjunctive between each Party of each Part, but leaves it a joint Covenant of the one Part, and ſeveral of the other, as the Duty is, which ought to be paid by both the Defendants, each having equal Benefit, [*Et quemlibet eorum*] ſhall be referred to the Plaintiff only, who is the ſole Party of this Part; the Covenant was to pay Freight, which the Defendant had not paid. *Per Cur'*, [*Non allocat'*] the Covenant being between them [*Et quemlibet eorum*] it is joint and ſeveral of each Part, 2 *Lev.* 56. *Bolton and Lee.*

Covenant between them, [*Et quemlibet eorum.*]

The

The Covenant is for Three jointly and severally, that they shall pay, and the Breach is assigned that the Defendant did not pay; *per Dodderidge*, he ought to aver, not any of the others. *Cur' contra*, the Difference is, If the Action had been brought against all, then the Non-payment shall be alledged in all; but when the Action is brought against one only, it sufficeth to say, that he did not pay; and if any of the others paid it, it shall be properly pleaded by the Defendant, *Palmer* 398.

Covenant for Three jointly and severally to pay, if Action be brought against one, and Breach he did not pay, need not aver, nor any of the others.

CHAP. XI.

Covenants Personal or Real.

REAL Covenants are, where a Man doth bind himself to perform a real Thing, as to pass Land by Fine, or when it runs in the Reality so with the Land, that he that hath the one is subject to the other; and so a Warranty is called a real Covenant.

Covenants real.

Covenant Personal. When it runs in the Personalty and not with the Land; as when a Man covenants to do any personal Thing, as to repair, *&c.* and yet this runs with the Land to the Assignee. *Vide infra.*

Covenants personal.

Some Covenants are inherent as it were, or conversant about the Land or Estate; as for quiet Enjoyment, Repairs, not to alien, to pay Rent, to make further Assurance, *&c.* these shall run with the Land in whose Hands soever they come.

Covenants inherent.

Other Covenants are called collateral, because they do not immediately concern the Thing granted. As to pay a Sum of Money in gross, to build upon another's Land, to give other Security to perform Covenants.

Covenants collateral.

You

You will find this Difference much in Uſe, in Reſpect of Aſſignments. *Vide infra.*

What ſhall be accounted real Covenants that run with the Land, or ſhall affect the Aſſets only.

Engliſh Bill in *Exchequer* was brought to ſubject the Defendant's Lands to the Payment of a Fee-Farm Rent; for that the Duke of *Norfolk*, who had in his Hands both the Plaintiff and Defendant's Lands, ſubject (*inter alia*) to the Payment of this Rent, had granted the Plaintiff's Lands unto one under whom the Plaintiff claimeth, and covenanted, that theſe Lands ſhould be diſcharged of the Rent; upon which Covenant the Plaintiff ſought Relief, and would have it to be as a real Covenant running with the Land, and charge the other Land with the whole Rent; but *per Cur'*, it is no more than an ordinary and perſonal Covenant, which muſt charge the Heir only in reſpect of Aſſets, and not otherwiſe: And the Bill was diſmiſſed. *Hard.* 87. *Coke verſus* Earl of *Arundel.*

Covenant, that the Lands ſhall be diſcharged of the Rent.

Covenant to repair Copyhold Eſtate.

Covenant to repair a Copyhold Eſtate runs with the Land, aſſigned by Common Law; and Aſſignees of the Reverſion of Copyhold Lands ſhall be within the Statute of 32 *H.* 8. *cap.* 34. *Vid. Lev.* 3d Part, 326. *Glover* and *Cope.*

By Grant of the Reverſion the Law transfers the Covenant of the Leſſee.

Where by the Grant or Deviſe of the Reverſion, the Rent reſerved upon a Leaſe for Years is well transferred to the Grantee; the Law alſo transfers the Covenant of the Leſſee to him for the Payment of it, as incident to the Rent. 2 *Sanders* 371.

Upon

Upon a Real Covenant there is but Remedy 4 Ways.

1. By Rebutter.
2. By Voucher.
3. By *Warrantia Charta.*
4. By Aid-Prior.

Feoffee with Warranty makes a Leaſe, Leſſee may not vouch; ſo he that comes in the Poſt ſhall not vouch. *Aliter* in Covenant Perſonal. 1 *Rol. Rep.* 26. 81. 5 *Rep. Spencer's* Caſe.

Covenants that run with the Land Eſtate.

Covenant for quiet Enjoyment. The Aſſignee ſhall have Action of Covenant without ſhewing the Deed of the firſt Aſſignment, for it is a Covenant that runs with the Eſtate, *Cr. El.* 436. *Noke's* Caſe, and the Executors or Husband, who is Aſſignee in Law, ſhall have the Benefit of ſuch a Covenant.

Aſſignee ſhall have Benefit of ſuch Covenant.

If I covenant with *J. S.* and his Heirs to make a Conveyance to one and his Heirs, his Heir may not have Covenant, becauſe it is a Sum in groſs; but otherwiſe, when ſuch a Covenant is in another Conveyance, and goes with the Eſtate. As if I covenant with *A.* and his Heirs to convey Land to him and his Heirs; there the Feoffment ſhall be to the Heir, for the Heir ſhall have the Covenant. *Palmer* 558.

Where the Heir ſhall have the Covenant.

Declarat', That the Defendant enfeoffed his Teſtator in certain Lands, and that he covenanted for him and his Heirs, That he was ſeized of a good Eſtate in Fee, and he alledgeth

Covenant brought by the Heir, and not by the Executor.

ledgeth the Breach. *Per Cur'*, The Covenant being made with the Heir, the Executor ſhall not have the Action, for the Covenant is annexed to the Land. *Winch. p.* 19. *Bull* and *Leſter*.

Tenant *per* Stat. *&c.* ſhall have Covenant, as a Thing annexed to the Land.

Tenant *per* Stat' Merchant, Staple, *Elegit* of a Term, and he to whom the Leaſe for Years is ſold by force of any Execution, ſhall have Action of Covenant in ſuch Caſe as a Thing annexed to the Land, although they come to it by Act in Law. 5 *Rep.* 17. in *Spencer's* Caſe; as,

What Grant ſhall be *quaſi* appurtenant to the Land.

If a Man grant to Leſſee, That he ſhall have ſo much Eſtovers as ſhall ſerve to repair his Houſe, or ſhall burn within his Houſe, and the like, during the Term: This is appurtenant to the Land, and ſhall run with it as a Thing appurtenant, in whoſe Hands ſoever it ſhall come. *Ibid.*

Covenant againſt Aſſignee of Part, becauſe it runs with the Land.

Leſſee of Two Houſes in *London* covenants for him and his Aſſigns to repair the Houſes; Leſſee aſſigns one of the Houſes and Parcel of the Land to *J. S.* and the Firſt Leſſor, for not repairing the Houſe aſſigned to *J. S.* brings Action of Covenant againſt *J. S.* The Action lies, for this Covenant runs with the Land. Sir *W. Jones* 245. *Conan* and *Kemiſe*.

CHAP. XII.

Covenant concerning Payment of Money. Place and Time.

ACtion of Covenant on Indenture, for Payment of Money at a certain Time; Defendant pleads Payment at the Time, and upon this Iſſue was joined *pro* Defendant. Plaintiff moved in Arreſt of Judgment, for that

that the Iſſue was misjoined, becauſe the Place of Payment was not alledged, which is material and ſo there can be no Judgment. It was ſaid on the other Side, it is not material to alledge a Place of Payment, becauſe it is a Perſonal Action, and it ſhall be intended where the Action is brought, 1 *Ed.* 5. *fol.* 3. *Rolls.* There is Difference between finding the Money paid, and the finding it not paid, *Stiles* 172.

Covenant to pay 10*s.* when *A.* comes to his Houſe, and 10*s.* at the Feaſt of St. *Michael* and at the Feaſt of St. *Andrew* then next following 10*s.* Theſe laſt Sums ought to be paid at the ſaid Feaſts or Times, and not at the next Feaſt after *A.* comes to his Houſe, 1 *Rol. Abr.* 442. *Lett. M. Pl.* 4.

Covenant upon an Adventure to *Newfoundland*, to pay ſo much Money within Forty Days next after the Ship ſhall make her Firſt Return and Arrival in this Voyage from *Newfoundland* into the Port of *Dartmouth*, or into any Harbour, Creek or Port, of *England*, where ſhe ſhall firſt unlade her Goods. The Covenantor is to pay the Money within Forty Days after the Arrival of the Ship, and ſhall not have Forty Days after the Unlading of the Goods, for this is not for Freight, but for Adventure; and the Unlading of the Goods is only mentioned to deſcribe the Haven where the Arrival ſhall be, and not to put a Limitation of the Payment of the Monies to have Forty Days after the Diſcharge, *Stiles fol.* 30. *Lee* and *Cholwick*, 1 *Rol. Abr.* 442.

A Covenant to deliver Twenty Quarter of Corn on the Twenty ninth of *February* next following, and that Month had but Twenty Eight Days. *Per Cur'*, he is not bound to deliver

To deliver *Febr.* 29. next following.

deliver the Corn till ſuch a Year comes, when *February* hath Twenty nine Days, and that is *Leap-Year*, 1 *Leon.* 101.

Acceptance before the Day.

If a Man is bound by Covenant or Bond, to pay a Sum of Money at ſuch a Feaſt and Place, and between certain Hours of the Feaſt-Day; and before the Feaſt, at another Place, he pays the Money to the Covenantee, and he makes Acquittance of this: This is a Diſcharge of the Covenant or Condition by the Acceptance, *&c.* *Dyer* 122.

Covenant to render and pay 1188 *Florins*, which then amounted to 33*l.* 12*s.* to be paid *Ad ſolutionem feſti Purific'*, called *Candlemas-Day*, next enſuing. The Plaintiff in his Declaration avers, That *Prædictæ ſolutiones dicti feſti Purification'* next, after the making the Covenant according to the Uſe of Merchants, were the Twentieth Day of *February*. Defendant pleaded *Non eſt factum*, and found againſt him; upon Arreſt moved, it was reſolved, that Payment amongſt Merchants is known to be on the Twentieth of *February*, and the Judges ought to take Notice of it, and the rather, the Defendant by his Plea confeſſeth the Declaration to be true in that Averment, 1 *Brownl.* 102. *Pearſon* and *Pointers*.

Payment amongſt Merchants.

If *A.* covenant the Firſt of *May* to pay to *B.* 10 *l.* at the Feaſt of St. *Michael*, without ſaying more, this ſhall be intended the Feaſt of St. *Michael* next enſuing, 1 *Rol. Abr.* 444. *Leaknor* and *Smallwood*.

A Covenant that *D.* Deputy-Poſt-Maſter of *Oxon*, for Six Months ſhould pay all ſuch Sums as he received while he continued Poſt-Maſter. On *Oyer*, the Defendant pleads Performance generally. Plaintiff replies, *E.*

continued

continued Two Years longer Poſt-Maſter, and ſuch a Day received ſo much, and paid not over. *Per Cur'*, no Action lay, the Six Months being paſt, and the Continuance after muſt be on new Agreement, 3 *Keb.* 45, 59. Lord *Arlington* and *Merick*, 2 *Sand.* 411.

Place of Payment, or Performance.

If a Place of Payment be limitted by the Covenant, he is not bound to pay it in any other Place, 1 *Rol. Abr.* 445.

Covenant to pay 10 *l.* at *D.* if the Covenantee accepts this, at another Place it's a good Performance, *Ibid.* 456.

CHAP. XIII.

Covenant to ſave harmleſs.

Covenant to ſave harmleſs from a Bond.

IF a Man enter into Bond with another for his Debt, with Condition to pay Money at a Day, and the Principal to ſave him harmleſs of the ſaid Obligation, and after he pays not the Money at the Day, by which the Bond is forfeited, and the Surety to avoid Suit pays the Monies; the Covenant is broken, and the Court ſaid it is a ſtronger Caſe by Reaſon of this Word [*Diſcharge,*] *Cranner and Gonerſull*, H. 14 *Jac. B. R.* 1 *Rolls Abr.* 453. But,

If *A.* Leſſee of a Term rendring Rent, aſſigns it to *B.* and *B.* covenants to keep *A.* without Damage of all Rents payable to the Leſſor, and after *B.* lets Parcel of the Land to *A.* and after the Hay of *A.* is there deſtrained for Rent-arrear, yet the Covenant is not broken, for that the Diſtreſs for the Hay is unlawful, and a Treſpaſs; and the Sufferance of the Rent to be in Arrear without actual Damages,

Covenant not broken by an unlawful Diſtreſs.

mages, is no Breach of the Covenant, 1 *Rolls Abr.* 433. *Coop and Pollard.*

Covenant to ſave them harmleſs of all Things contained in the Indenture, extends not to Bond of Covenants.

If *A.* and *B.* are bound in an Obligation to perform certain Covenants contained in an Indenture, whereof one is to pay certain Monies, and *C.* covenants with *A.* and *B.* to ſave them harmleſs of all Things contained in the ſaid Indenture, and after the Money is not paid according to the Indenture, whereby the Obligation is forfeited; yet it ſeems *C.* is not bound to ſave them harmleſs from the Bond, for it is a Thing collateral to the Indenture, *Scot and Pope* verſus *Griffin*, *Mic.* 5 *Jac.*

Condition of a Bond, reciting, That whereas the Plaintiff and one *H.* were bound in another Bond for Performance of Covenants; if the ſaid *H.* ſhould perform the Covenants in that Indenture, and ſhould ſave the Plaintiff harmleſs of the ſaid Bond, then, *&c.* The Defendant on *Oyer* of the Condition pleaded, that *H.* had performed the Covenants in that Indenture, and that he had ſaved the Plaintiff harmleſs of that Bond. Upon a general Demurrer the Plea is ill in Subſtance, both becauſe the Covenants in the Indenture were not ſet forth, and ſome of them might be in the Negative, *&c.* and alſo, becauſe he hath not ſhewed how he ſaved the Plaintiff harmleſs, *Allen* 72. *Ellen and Box.*

Shews not how he ſaved harmleſs.

A Man ſold his Land, and covenants to ſave the Vendee harmleſs on Requeſt. It was ſaid, If the Land be extended by Force of a Statute before the Requeſt, the Covenant is not broken, for that now the Covenant is become impoſſible by the Negligence of the Covenantee himſelf, *More* 67.

Covenant was, That the Covenantee, his Heirs and Aſſigns, ſhall and may lawfully enjoy and hold a Meſſuage, *&c.* without the Let, *&c.* of the Covenantor or his Heirs, or of every other Perſon diſcharged, or upon reaſonable Requeſt, ſaved harmleſs by the ſaid Covenantor from all former Gifts. Defendant pleads, no Requeſt was made to ſave him harmleſs. Judgment *pro Quer'*, becauſe the Defendant hath not anſwered to all the Covenants, *(viz.)* to the Enjoying of the Lands; for there were Two Covenants, the Enjoying, and ſaving Harmleſs, *More* N° 797. *Fol.* 591. *Creſwel and Holmes.*

Covenant for quiet Enjoyment and ſaving harmleſs, both muſt be anſwered.

The Covenant was; Whereas *J. F.* claimed to have a Leaſe for Years of the Mannor of *Dale*, made to him by *W.* That the Defendant would keep without Damage from all Claim and Intereſt to be challenged by *J. F. De tempore in tempus*, during the Years, *&c.* The Defendant pleaded, That after the making of the Obligation until the Action brought, the Plaintiff was not damnified *Ratione dimiſſionis.* The Plea is good, for if he were not damnified *Ratione dimiſſionis*, then he was not damnified by Reaſon of any Claim or Intereſt, 3 *Lev.* 118. *Brainthwayt's Caſe.*

Plea, That he was not damnified *Ratione dimiſſionis.*

Of the Pleading.

Covenant to ſave harmleſs and indemnify the Plaintiff and his Lands in *Sale*, from an Annual Rent of ſuch a Leaſe during the ſaid Term. Defendant pleads, *Quod a tempore confection' ſcrip' præd' hucuſq; exoneravit & conſervavit*, the Plaintiff and all his ſaid Lands from the ſaid Rent, *Et hoc*, &c.

Defendant ought to ſhew how he ſaved harmleſs.

Plaintiff demurs, he ought to ſhew *Quomodo exoneravit*, it being a Plea in the Affirmative; had he pleaded *Non damnificat'*, it had been good, *Cr. Jac.* 634. *Horſman and Obbins. Wind*

Covenant to ſave harmleſs from Suits and lawful Evictions. Defendant pleads Performance. Plaintiff replies, That *J. S.* took out a Writ by *Hab' fac' poſſeſſion'*, out of *B. R. Debito modo execut'*, and by Vertue thereof entered on the Poſſeſſion of the Plaintiff, and did expel and amove him. Defendant demurs, Judgment *pro* Defendant, *Debito modo* is not ſufficient without ſhewing Particulars. *Contra* in Spiritual Court. As in Debt for Rent, to ſay *A.* did demand *Debito modo*, it is ill, the *Hab' fac' poſſ'* doth always recite the Term of the Judgment, and that muſt at leaſt be ſhewed, but not the Title of him that evicted; *per Windham*, 1 *Keb.* 379, 413. *Nicholes and Pullen*, 1 *Lev.* 83.

Dubito modo execut'.

In Conſideration of Promiſe of 7 *l. per Annum* for Five Years, the Defendant promiſed to ſave harmleſs againſt all; but *P.* the Plaintiff ſhewed, that one *Mare* entered: Here is no Leaſe, as there was in the Caſes of *Brocham* and *Cham*, and *Gotier*'s Caſe, *Dyer* 328. *Hob.* 35. And ſo no lawful Title of Entry need to be ſhewed, the Debate not being concerning the Title, but only concerning the Occupation, 3 *Keb.* 755. & 2 *Lev.* 194.

Gregory and *Mayo*: In Covenant, that the Defendant was lawfully ſeiſed, is intended only as to the Title, and the Covenant for quiet Enjoyment is intended only as to the Poſſeſſion.

Leſſee

Leſſee covenanted to build an Houſe upon the Land within Ten Years: Leſſee aſſigned his Term. Action is brought againſt the Aſſignee. Aſſignee pleads, That the Leſſor entered, and had the Poſſeſſion for Part of the Ninth Year. *Per Cur'*, he ought to have ſhewed, that he held him out with Force, and would not ſuffer him to build, (for it may be he entered by Right, for Non-payment of Rent) as indeed it was, *Godb. p.* 69, 20. *Barker* and *Fletwell.* Covenant to build.

Covenant to build, &c. Vide *Covenant to repair.*

Covenant that he would erect Three Houſes upon ſuch Land demiſed to him, unleſs he were reſtrained by the King's Proclamation. Defendant pleaded, That ſuch a Day and Year the King made a Proclamation to reſtrain Building. Plaintiff demurred, becauſe no Place is expreſſed where the Proclamation was made, and ſo no *Venue* can be if Iſſue be joyned thereon; and alſo, becauſe it is not pleaded to have been *Sub magno Sigillo Angliæ*; and of that Opinion was the Court. For Proclamations bind not, unleſs they be under the Great Seal, and if it be denied, there can be no Iſſue thereon (but only *Null tiell Record*); which cannot be, unleſs it be pleaded to be *Sub magno Sigillo*, *Cro. Car.* 180. *Keyly* and *Manning.* How Proclamations are to be pleaded.

In Covenant to build an Houſe, *Juxta regulas preſcript'* in the *Stat.* 19 *Car.* 2. *c.* The Breach was aſſigned in not covering with Cantilevers with Lead, *Juxta regulas preſcript'* in the aforeſaid Act of Parliament, to which

the Defendant demurred. *Per Twiſden*, it ſhould be recited, that the Statute doth ſo preſcribe. *Wild, contra*, This is not iſſuable, but confeſſed by the Demurrer, not to be done *Juxta regulas preſcript', in Prædict' actu*; but the other is a ſufficient Averment. But C. J. *Hales* gave Judgment, becauſe the very Covenant it ſelf ſtops to ſay it was otherways in the Act of Parliament; but were this not the Covenant it ſelf, the Breach were too ſhort, unleſs it be averred, that the Act of Parliament is to cover with Cantilevers, *&c.* 3 *Keb. Dix* and *Long*, 142, 151. 2 *Lev.* 85.

Where the Act of Parliament muſt be averred or not.

If *A.* covenant with *B.* to build an Houſe by a Day, and *B.* doth forbid him, and thereupon he forbears to do it; in this Caſe the Covenant is broken. But if he do by actual Impediment hinder him, or be the Cauſe why the Thing is not done, then the not doing it is no Breach of Covenant.

Covenant to pay Money on Procurement of Pardon.

In covenant to pay 1200 *l.* on Procurement of Pardon for *Blundell*, who killed the Lord *Taff* in *Ireland*. The Condition of the Articles was, That if *B.* were acquitted or pardoned, they ſhould pay 1200 *l.* *B.* was convicted of Manſlaughter, and the Penalty pardoned; 900 *l.* was depoſited in the Hands Sir *John Frederick*. It was pray'd that common Bail might be accepted, this being an odious Contract to be diſcountenanced: Which the Court agreed as to the Acquittal, being in Effect to ſtifle Evidence, and embrace Jury; but as to the Pardon alone, it might be leſs Illegal. But here is no Pardon of the Offence

Offence within the Intent of the Articles, but only a Pardon of the Penalty of Conviction, and an Appearance was only granted, 3 *Keb.* 415. *Armſtrong* and *Gold* verſus *Cornwall*. No Pardon within the Intent of the Articles.

Covenant to permit.

Where no Act is to be done, but only a Permittance, he need not plead it ſpecially, and not *Permiſit* or *Permiſit*, is a good Plea. *Non permiſit* or *Permiſit*, where a good Plea.

One is bound to permit his Tenants to uſe the Common, and that he ſhall not alter the Courſe of the Common, *quod permiſit*, and that he did not alter, *&c.* is a good Plea generally, 11 *Eliz. Dier* 279. *Pl.* 6.

A Covenant, that the Plaintiff to ſuch of the ſaid Lands as by the Cuſtom of the Country *Tunc jacebant friſcæ*, ſhould have free Ingreſs, *&c.* The Defendant pleads, *Quod permiſit querentem intrare*, &c. *in Tales terras quales tunc jacebant friſcæ ſecundum conſuetudinem patriæ*, he need not ſhew what Lands did lie freſh, 1 *Leon.* 136. *Littleton* and *Perne*. For here is no Act to be done, but a Permittance, and it was in the Negative and a not Diſturbance, in which Caſe Permiſſion is a good Plea. *Non permiſit*, in what Caſe a good Plea.

L. covenants with *S.* that he would ſuffer him and his Aſſigns to have free Ingreſs, *&c.* into his Houſe and Shop, without Let or Interruption of the ſaid *L.* And that *S. appunctuavit* one *T. ut ſervientem ſuum in meſſuagium*, &c. *intrare, & præd' L. expulit.* It was moved in Arreſt: 1. It is alledged that *L.* expelled the Servant, but this was the Expulſion of the Maſter. 2. *Appunctuavit intrare*, and ſaith not what Time, for perhaps his Licence to enter might be determined. 3. It is not ſaid

at what Time he entered, but *Super quo intravit*; but all theſe Exceptions were overruled, 2 *Rol. Rep.* 78. *Snelling* and *Low*.

A Man makes a Leaſe for Years, and Bond with Condition, that he ſhall ſuffer the Leſſee peaceably and quietly to enjoy during the Term, and that without Trouble or Eviction of the Leſſor, or any other Perſon, then the Obligation to be void. *Per Cur'*, the Word [Suffer.] [Suffer] ſhall rule all the Reſidue of the Sentence; ſo that by the Entry of a Stranger on the Leſſee, without Procurement of the Leſſor, the Obligation is not forfeited, *Dyer* 255.

In Covenant the Plaintiff declared, That he had and held the Office of Chamberlain to the Queen-Dowager, and that by Deed produced in Court, he agreed with the Defendant for the Sale of the ſaid Office, and that the Defendant ſhould hold it with the Conſent of the Queen; but by the ſaid Writing the Defendant obliged himſelf, that the Plaintiff ſhould have, receive and enjoy, (during the Life of the Plaintiff) divers Penſions and Salaries belonging to the ſaid Office, and that the Defendant ſhould receive no Part of them. Then he ſhews, that the Defendant at his Procurement, and with the Approbation of the Queen, was admitted, and enjoyed it; and Ten Years were in Arrear of a Salary due to the Plaintiff, which the Plaintiff had not received, and the Defendant had not paid him, *Licet ſepius requiſitus*. Defendant pleads, That he, from the Time of the Agreement to the Time of the Writ brought, permitted the Plaintiff to receive yearly the Profits, according to the ſaid Agreement, *abſq; hoc*, that the Defendant re-

ceived any Part of the Profits of the ſaid Office.

Per Cur', the Plea is good, and that upon the Agreement the Defendant was not bound to pay the Money due, but only reſtrained from intermedling, 2 *Vent.* 79. *Killegrew's* Caſe, 4 *Mod.* 2 *Ventr.* 79. *Killegrew's Caſe.*

Plaintiff demiſed Two Houſes in *Mark-Lane*, in the Pariſh of St. *Margarets*, *Weſtminſter*, with all Ways, Paſſages, *&c.* for Twenty one Years, at 24 *l.* Rent. The Defendant covenants, that ſhe would permit at his own Coſts to make a Drain, to convey the waſte Water from the demiſed Houſes to the main Shore in *Six-Bell-Yard*. He ſhews he entered, and that the Defendant had broke the Covenant, *eo quod*, That ſhe being poſſeſs'd of a Term for Years then and yet to come, of a certain Parcel of Land, and Two Stables, lying between the demiſed Premiſſes and the ſaid main Shore in *Six-Bell-Yard*, and by which the Drain ought to run, and then ſets forth, the Defendant had aſſigned all her Term in the ſaid Piece of Ground and Stables to *Tomlinſon*, who entered and died poſſeſs'd; and *Mary* his Wife, as Adminiſtratrix, poſſeſs'd her ſelf of it, and married to *Baker*, and the ſaid *Baker* and his Wife *non permiſerunt* to make a Drain, but refuſe. Defendant pleads, the ſaid Paſſage being in the demiſed Premiſſes, is ſituate in the Pariſh of St. *James's* aforeſaid, and leads from the demiſed Houſes in *Six-Bell-Yard*, and ſuch a Drain might have been made, and ſtill may be. And the Defendant did permit the Plaintiff to make a Drain, and the Plaintiff might have done it. Plaintiff demurs.

Per Cur', there ſhall not be Election to make the Paſſage thro' the Stables, *&c.* if other proper Ways may be.

But there were Exceptions to the Declaration:

1. There is no certain Place laid for the Houſes demiſed, which are ſaid to be lying and being in the Pariſh *præd'*, whereas there are Two named before, St. *Margaret's* and St. *James's*.

2. The Breach, *Eo quod*, they did not permit, is no poſitive Affirmation.

3. The Covenant is, That the Defendant, her Executors, Adminiſtrators and Aſſigns, ſhall permit. And the Breach is laid in the Aſſignees not permitting, and it appears in the Pleading, that this Aſſignment was made to *Tomlinſon* divers Years before this Demiſe to the Plaintiff. And this Covenant cannot be extended, but only to the Aſſignees of the Defendant after the Demiſe made.

4. It is ſaid, *Quod non permiſerunt*, but no ſpecial Diſturbance, which ought to have been particularly ſet forth for the Court to judge of.

Per Cur', all theſe Exceptions but the Second are fatal, eſpecially becauſe the Diſturbance is laid to be by an Aſſignee, who came in before the Demiſe, 1 *Sand.* 116. as to the Second Exception, 2 *Ventr.* 277. *Target* and *Lloyd*.

Covenant not to alien or assign.

Lessee for Years covenants with his Lessor, That he will not assign the Land let, nor any Part thereof, without the Lessor's Consent. Lessor enters into Part, Lessee assigns over the rest without Consent; Action of Covenant lies, for it was collateral, *Stiles* 265. *Collings* and *Silly*. And the Covenant is broken, notwithstanding the Lessor's Entry into Part of the Land.

Lessor enters into Part, Lessee assigns the rest.

Lessee covenanted, That he will not alien the Advowson let to him without Consent of the Lessor, and shewed he had alienated to *J. S.* without his Consent. Defendant pleads, he had not aliened without his Consent, and found *pro Quer'*, the Breach was well laid, tho' he hath not laid the Alienation to be by Deed, (an Advowson not passing without Deed,) for it shall be intended to be by Deed, *Winch. p.* 34.

Alienation by Deed.

Debt on Bond, conditioned for Performance of Covenants in a Lease. One was, That the Lessor, his Executors or Assigns, shall not alien without Licence of the Lessor, but only to his Wife and Children. The Lessee deviseth to his Wife, and makes her his Executrix, who enters therein as Legatee, and takes *King* the Defendant to Husband, and they alien the Estate. Lessor brings Debt upon the Bond, they pleaded they had not aliened *contra formam Conventionis*. The Plaintiff shews the Alienation aboveſaid, and it was thereupon demurred. *Per* Three Justices, the Covenant is broken, for the Feme is restrained from aliening by express Words,

Not to alien but to Wife or Children.

as

as well as the Leſſee himſelf, for it extends to the Leſſee and his Aſſigns, and ſhe is Aſſignee; ſo tho' there was once Alienation by Licence, yet that Aſſignee cannot alien without Licence. But *per Walmſly*, the Words are, That the Leſſee or Aſſignee ſhould not alien but to his Wife or Children; and the Wife is not within theſe Words, for ſhe cannot alien to her ſelf. But it hath been adjudged, that where a Condition within a Leaſe was, that neither he nor his Aſſigns ſhould alien without Licence. The Leſſee died inteſtate, the Adminiſtrator was bound by this Condition, *Cr. El.* 757. *Thornhill* and *Adams* ver. *King & Uxor*, *Dyer* 152.

Where tho' there was Alienation by Licence, yet that Aſſignee cannot alien without Licence.

Where Adminiſtration is bound by ſuch a Covenant.

If a Man by Indenture letteth Lands for Years, provided always, and it is covenanted and agreed between the ſaid Parties, that the Leſſee ſhould not alien; it was adjudged, that this was a Condition by Force of the Proviſo, and a Covenant by Force of the other Words, 1 *Inſt.* 203. *b.*

Covenant to render the Poſſeſſion at the End of the Term.

One ſeiſed in Fee of Lands, lets it for Years, and Leſſee covenants to render up the Poſſeſſion to the Leſſor, his Heirs and Aſſigns, at the End of the Term, upon Requeſt. And after the Leſſor aſſigns over the Reverſion to Two, and one of them at the End of the Term comes to the Leſſee, and demands the Delivery of Poſſeſſion. Upon this Demand, by one only he is bound to deliver Poſſeſſion, otherwiſe he hath forfeited his Covenant; for the Demand of one joint

Requeſt.

Tenant

Tenant is ſufficient for both, 1 *Rol. Abr.* 428. *Linghen* and *Paine.*

Covenant to pay all Taxes.

In Biſhops Leaſes, is not intended of any other Taxes than ſuch as were in Being and Uſe before, and anciently contained in the Leaſe, and that was only againſt Syndals, Procurators, Tenths and Subſidies, and not to Charges of another Nature, 3 *Keb.* 69. *Davenant* againſt Biſhop of *Salisbury.*

Leaſe for Years, rendring Rent *per* Indenture, in which were divers other Covenants, and Leſſee bound himſelf to the Performance of all Payments, Covenants and Conditions in the Indenture; and in Debt on the Bond, the Defendant pleads Performance and Breach aſſigned, becauſe the Rent was not paid, no Demand of the Rent was alledged. *Cur' pro Quer'*, becauſe the Defendant had bound himſelf to perform all, and this by another Deed, which is collateral to the Indenture, otherwiſe had it been, if it had been in the ſame Deed. And ſo is 7 *Rep. Maud*'s Caſe, *Tracy* and *Dutton*'s Caſe, and *Payments* imply *Rents*, *Palmer* 490. *Polſon* and *Warren.*

Bound to perform by a collateral Deed, or in the ſame Deed, and a Diverſity.

(Payments,) What it includes.

Covenant by Leſſee to pay ſuch a Rent, (without Words of Reſervation) makes this a Rent, 1 *Rol. Rep.* 80. 2 *Bulſt.* 281.

CHAP.

CHAP. XIV.

Covenants upon Marriage-Agreements.

Conſtruction.

UPON Marriage, the Plaintiff covenants to pay to his Son-in-Law and Daughter 20 *l. per Annum*, and upon Demurrer the Queſtion was, If 20 *l.* by the Year ſhall be intended for One Year only, or for their Lives? It ſhall be for their Lives, and the Maintenance ſhall be as laſting as the Marriage, 1 *Sid.* 151. 1 *Lev.* 102. *Hork* and *Swaine*. It is in lieu of a Portion, and ſhall be taken ſtrongly againſt the Covenantor.

Conſtruction of the Words, [20 *l. per Annum.*]

If one covenant to pay 10 *l.* to the Covenantee at the Day of the Marriage of the Covenantee, the Covenantee is not bound to give Notice to the Covenantor before his Marriage, at what Day he will be married; but the Covenantor ought to take Notice of it at his Peril, in as much as he hath taken it upon him to pay it at the Day, 1 *Rol. Rep.* 14 *Jac.* 355. *Beresford* and *Goodrouſe*, 2 *Cro.* 404. So if it were a Covenant to pay ſo much within a Year after *B.* ſhall marry *C.* 1 *Rol. Abr.* 463. *Stepard* and *Fry*.

If *A.* ſeiſed of Lands in Truſt for *B.* covenants with *J. S.* That in Conſideration that he would marry his Daughter, that he himſelf would ſtand ſeiſed of the Land to the Uſe of *J. S.* for Life, Remainder to *D.* in Fee, the Marriage takes Effect. *J. S.* not having Notice of the Truſt, it ſeems that the

the Eſtate for the Life of *J. S.* nor the Remainder of *D.* are not ſubject to the Truſt, becauſe that they come in under a valuable Conſideration (*viz.*) the Marriage, and have not Notice of the Truſt, 2 *Rol. Abr.* 781. Sir *George Reynell* and *Peacock.*

In *Aſſumpſit*, about the Communication of the Marriage of his Daughter, the Defendant promiſed him, That if he would haſten the Marriage, and have a Son within Twelve Months then next following, he would give him 100 *l.* He ſets forth, he did haſten the Marriage, and had a Son within Twelve Months after the Marriage, and a Verdict *pro Quer'*, and it was moved in Arreſt of Judgment, that the Plaintiff had not ſet forth he had a Son within the Time (then next following) ſhall be referred to the Time of the Communication. But, *Cur' contra*, 1 *Ventr.* 262.

If I covenant with a Man, that I will marry his Daughter, and he covenants with me, that for the ſame Cauſe he will make an Eſtate to me and his Daughter, and to the Heirs of our Two Bodies begotten, of his Mannor of *D.* he ſhall not make it till we are married, *Godb.* 8.

Defendant covenanted, That if the Plaintiff, *ad inſtantiam Defendentis*, would marry the Defendant's Daughter, he would pay him 20 *l.* and give him Twenty *French* Pieces towards his Wedding-Dinner; and alledgeth *in fact'*, that he had married the Defendant's Daughter, and had required him to pay the 20 *l.* and he had not paid it; and that Twenty *French* Crowns amounted to Six *Pounds* in our *Engliſh* Money, and the Defendant had not paid them. *Object.* 1. He avers not, that he had married her *ad inſtantiam Defendentis:*

dentis: But *per Cur'*, it ſhall be intended ſo; and Twenty *French* Pieces is not Twenty *French* Crowns, for it may be any other Pieces. But *per Cur'*, *French* Crowns are the common Coin of *France*, and here known; and it ſhall be intended according to the uſual Speech, *Cr. Car.* 195. *Poynter* and *Poynter*.

In Conſideration the Plaintiff would marry his Daughter *Sarah*, he promiſed to give him as much in Marriage with her, as he gave in Marriage with any of his other Daughters, and alledgeth he had Three Daughters, *Alice*, *Anne* and *Sarah*; and that *Alice* married *E.* and that he gave *E.* 100 *l.* and a Bond of 100 *l.* to pay to *E.* 50 *l.* more at Three Months end after his Deceaſe, if the ſaid *Alice*, or any Iſſue of her Body, were then living; and aſſigns for the Breach, that he had only paid him 40 *l.* in his Life-time, and that he had requeſted of the Defendant his Executors 60 *l.* more, and a Bond for the Payment of 50 *l.* and avers that *Alice* had ſuch Iſſue alive. *Per Cur'*, he ought to have averred, that *Sarah*, or ſome Iſſue of her Body, was then alive; but the Judges agreed not, whether the Covenant or Promiſe extends only to Money given, and not to the Bond, *Cr. Car.* 186. *Cule* and *Thorn*.

In Conſideration of Marriage, the Defendant promiſeth or covenants he would pay for the Wedding-Apparel. Plaintiff alledgeth, he married her, and provided for her Two Gowns and Two Petticoats, and the Defendant had not paid; and it was moved for Error, that he ought to pay for One Gown and One Petticoat, and no more, *Sed non allocatur*. Wedding Apparel to be taken

ken according to common Parlance, *&c.* on the Wedding-Day, and uſed ſome Time after, and the Declaration is good, *Cr. Car.* 53. and *Fletcher* in *Seac'*.

If *A.* covenants with *B.* Whereas there is a Marriage intended to be ſolemnized between *A.* and *C.* the Daughter of *B.* at or before the Fourteenth Day of *Auguſt* next, and whereas the ſaid *B.* hath paid *A.* 1000 *l.* Portion, *&c.* The ſaid *A.* in Conſideration thereof, doth covenant with *B.* That he within One Year of the Day of the Marriage, will aſſure Lands of the Value of 400 *l.* *per Annum.* Albeit the Marriage be not before that Day, yet the Covenant muſt be performed, *Trin.* 21 *Jac. B. R. Gregory* and *Lane.*

Covenant to pay 300 *l.* in Conſideration of a Marriage between the Plaintiff and his Daughter; which 300 *l.* was to be paid within Three Months after that he ſhall come to the Age of Eighteen Years, or within Eighteen Days of the Marriage, after Notice made, which ſhall firſt happen. *Per Cur'*, the Notice ſhall relate to both, becauſe it is uncertain which of them ſhall happen firſt, *Latch.* 158. *Read* and *Bullington.*

CHAP.

CHAP. XV.

Covenant as to Payment of Rent.

In what Caſes lies, or not. Vid. *Covenant againſt Executors.* Vid. Tit. *Aſſignment.*

C. C. made a Jointure to his Wife *Mary* for her Life, and dies without Iſſue; *T. C.* his Brother and Heir, grants an Annuity or Rent-Charge of 200 *l. per Annum*, to the Plaintiffs in Truſt for *Mary*, and this was to be in Diſcharge of the ſaid Jointure; *Habend* to them and their Heirs, Executors, Adminiſtrators and Aſſigns, in Truſt for *Mary*, for Life, with a Clauſe of Diſtreſs and Covenant, to pay the 200 *l. per Annum* to the Truſtees for the Uſe of *Mary*. The Breach aſſigned was, That the Defendant had not paid the Rent to them to the Uſe of *Mary*. Defendant demurs ſpecially, becauſe it appears here as a Grant of a Rent-Charge for Life, which is executed by the Statute of *Uſes*, and therefore there ought to have been a Diſtreſs for Non-payment. *Per Cur'*, the Clauſe of Diſtreſs is given by the expreſs Words of the Statute to *Ceſty que Uſe*. But here is a double Remedy by Diſtreſs or Action; for if the Leſſee aſſign his Intereſt, and the Rent is accepted of the Aſſignee, yet Covenant lies againſt the Leſſee for Non-payment, upon the expreſs Covenant to pay. So if a Rent be granted to *S.* and a Covenant is to pay it to *N.* to his Uſe, it is a good Covenant, 2 *Mod. Rep.* 138. *Coke* and *Herle*.

Double Remedy by Diſtreſs or Action.

It was objected, That it is not ſaid the Money was not paid to *Mary*, and if not paid to her, the Breach is not well aſſigned: But *per Cur'*, it is good. And the Aſſigment of a Breach, according to the Words of the Covenant, is good enough. And if the Defendant did pay the Money to the Plaintiff, or to *Mary*, he might plead it.

Aſſignment of a Breach, according to the Words of the Covenant.

Covenant ſhall be intended to be brought upon a Deed, according to the Nature of the Covenant. In *Scire fac'* on Recogniſance to keep Covenants ſpecified in certain Indentures ſet forth, which was a Demiſe by *S.* to *E.* and a Redemiſe by *E.* to *S.* rendring Rent at *Lincolns-Inn-Hall*. Defendant pleads Performance, Plaintiff ſhews, there is Rent due at *Michaelmas* laſt, and ſo a Breach. It was moved in Arreſt of Judgment, that it is not ſufficient. The Condition being to perform Payments in both Indentures, and the Breach is only aſſigned *In ultimo mentionat'*, and either in Severalty ſhall not be intended; but *per Cur'*, either of them are ſupplied by the Nature of the Covenants. The Iſſue in *Chancery* was on Payment at *Lincolns-Inn-Hall*, the Venue muſt be from *Holborn*, 1 *Keb.* 471. *Eden* and *Spiller*.

Covenant to be brought upon a Deed in Nature of the Covenant.

If the Leſſee aſſigns his Term, and after the Leſſor aſſigns his Reverſion, and the Aſſignee of the Reverſion accepts the Rent of the Aſſignee of the Term, yet he may have Action of Covenant againſt the firſt Leſſee. But *per Twiſden*, If after ſuch Aſſignment of the Reverſion, Leſſor brings Covenant, Leſſee may not plead he had aſſigned over his Reverſion. But which of them, whether the Leſſor or Aſſignee, which firſt brings his Action, ſhall bar the other, *(viz.)* Leſſee

Leſſee aſſigns his Term, and the Leſſor his Reverſion, the Reverſioner accepts the Rent of the Aſſignee, yet he may have Action of Covenant againſt the firſt Leſſee.

ſhall plead ſuch Recovery in Bar to the former Action, *Sid.* 402. in *Thursby* and *Platt's* Caſe, *&* 1 *Lev.* 259.

Rent paid before the Day, this is no Performance of the Covenant.

If Leſſee covenant to pay his Rent to the Leſſor, and he payeth it before the Day, the ſame is not any Performance of the Covenant; contrary of a Sum in groſs, 1 *Lev.* 136.

Expreſs Covenant to pay the Rent at ſeveral Days, Covenant lies before all the Days of Payment paſt.

When expreſs Covenant is to pay the Rent at ſeveral Days, Action of Covenant will lie before all the Days of Payment be paſt, and Action of Debt will not lie till all the Days of Payment be paſt, and in ſuch Caſe Debt lies properly on Grant of Annuity for Life or Years, 1 *Brownl.* 19, 20. *Mordant* and *Wats.*

Rent of 200 *l. per Annum*, granted to *B.* and *H.* for the Life of *M. Hab.* &c. *ad opus & uſum M.* and Covenant was in the Indenture to pay the Rent, *ad opus & uſum M. B.* and *H.* brought Covenant, and good. This Remedy by the Statute of Uſes was not transferred to *M.* 1 *Mod.* 223. *Boſcawen* verſus *Cook.* By the Statute 27 *H.* 8. *c.* 10. *Ceſtuy que Uſe* of a Rent hath all ſuch Remedies, as if the Rent had been actually granted to him; but that hath Place only where one is ſeiſed of Lands in Truſt, that another ſhall have a Rent out of them, and not where a Rent is granted to one to the Uſe of another, *Vid. ibid. &* 2 *Mod.* 138.

Diverſity between *Ceſtuy que Uſe*, and *Ceſtuy que Truſt.*

A Man grants a Rent to one *pro* Life, and half a Year after to be paid at the Feaſts of the Annunciation and *Michaelmas*, by equal Portions, and covenants with the Grantee for the Payment of it accordingly. The Grantee dies 2 *Febr.* and for 20 *l.* which was a Moiety of the Rent, and to be paid at the Annunciation

Annunciation after, the Executors of the Grantee bring Action of Covenant, it is well maintainable And by *Coke*, If a Man grants Rent for another's Life, the Remainder to the Executors of the Grantee, and covenants to pay the Rent during the Term aforeſaid; this is good *Collective*, and ſhall ſerve for both Eſtates. And it was agreed, when a Rent is granted, and by the ſame Deed the Grantor covenants to pay it, the Grantee may have Annuity or Writ of Covenant at his Election, 2 *Brownl.* 283.

[During the Term,] to what it extends.

Annuity or Covenant, at Election.

Declaration.

In Debt for Rent *Quod cum pro Indenturam Teſtatum exiſtit*; on Demurrer in *Shelbery's* Caſe, Judgment was for the Defendant. But in Covenant on Bond to perform Covenants, ſuch Declaration is good. *Per Cur'*, 2 *Keb.* 383. *Coquer* and *Crine*. 1 *Keb.* 570. *Lenox* and *Drury*. Debt is grounded on the Demiſe, which muſt be more poſitively alledged. *Contra* in Covenant, which is collateral.

Quod cum pro Indenturam Teſtatum exiſtit, good in Covenant, not in Debt *pro* Rent.

In Debt or Covenant by Heir or Executor, for Rent, he muſt ſay the Teſtator was poſſeſſed; and ſo of Succeſſors of Biſhops, he muſt ſay he was ſeiſed, and convey the Reverſion by Deed; for Biſhop, Dean, or Corporation, cannot be intended ſeiſed in other Capacity, 3 *Keb.* 69. *Davenant* verſus Biſhop of *Salisbury*, 2 *Lev.* 68.

In Covenant by Heir or Executor, how to declare.

In Debt on Articles of Agreement to pay Annuity, during the Reſidue of the Term, aſſigned to *J. S.* not ſhewing for what Years or Term, and Breach aſſigned in Non-payment during the Reſidue of the Term,

To pay Annuity during the Reſidue of the Term, not ſaying for what Years or Term.

without ſaying [Yet to come]; and ſo when the Damages are laid, the Term might be expired. After Judgment by *Nihil dicit*, the Court conceived it might be ill. *Contra*, if a Verdict were, for then a Term ſhall be intended, 1 *Keb.* 435. *Smith* and *Taylor*.

To pay quarterly, but ſaith not *Annuatim*.

Plaintiff declares, That he demiſed to the Defendant certain Lands for Thirteen Years, to pay to him 40 *l.* quarterly, and ſaith not *Annuatim*: It was amended, and the Word *Annuatim* inſerted. By *Keling* and *Windham*, the Addition of [*Annuatim*], is no more than what the Law implied before, *Ray* 160. *Rymes* and *Baker*.

In expreſs Covenant to pay the Rent, there needs no Demand.

If the Leſſee covenant to perform Articles in Indenture, it is ſufficient to ſay, the Rent was demanded; but if there be an expreſs Covenant to pay the Rent, there needs no Demand. 3 *Keb.* 299.

Another Diverſity between Debt for Rent and Covenant.

Covenant for Payment of Rent at divers Days, which amount to ſuch a Sum; in the Declaration the total Sum is miſcaſt, yet good, for that all in this Action ſhall be recovered in Damages. *Aliter* in Debt for Rent, 1 *Rol. Rep.* 351. *Farrer* and *Snelling*, 3 *Bulſt.* 155.

But in Bond to perform Covenants, there muſt be a Demand for the Rent.

In Covenant to pay Rent, in the Declaration there is not any Demand alledged, and need not, becauſe the Covenant was to pay ſuch a Sum for Rent expreſly. But as to a Condition of a Bond for Performance of Covenants expreſſed in ſuch a Leaſe, one of which is for Payment of Rent; in that Caſe the Bond will not be forfeit without a Demand, 1 *Ventr.* 259. *Norton* and *Harvey*.

Sir *John Spencer* made a Leaſe for Years to Sir *John Points*, rendring Rent by Indenture. Leſſee Covenants, That if the Rent be behind

hind at any Time of Payment, according to the Form of the Indenture, That the Leſſor ſhall have 200 *l.* *Nomine Pœnæ*, for ſuch Default, the Rent is behind. Debt is brought for the *Nomine Pœnæ*. *Per Cur'*, Action of Debt did not lie without Demand of the Rent. *Vide Fitzh. N. B.* 120. ſeems contrary, *Godb.* 154. 1 *Rol. Abr.* 459, 460. Sir *John Spencer* and *Point's* Caſe. [*Nomine Pœnæ.*]

Who to do the firſt Act by Demand.

If a Man lets Land *per* Indenture for Years, reſerving a Rent payable at certain Days at *L.* and the Leſſee in the ſame Indenture covenants to pay the ſame Rent at the Days and Place aforeſaid, he ought to pay it without any Demand of the Leſſor, *Paſ.* 5 *Jac.* 1. *B. R.* Sir *John Spencer's* Caſe, 1 *Rol. Abr.* 459, 460. Diverſity between Covenant and Obligation to perform Covenants.

But if a Man let by Indenture certain Coal-Mines, reſerving Rent, and Leſſee is bound to obſerve, perform, pay and keep, all Payments, Rents, Covenants, Grants and Agreements in the ſaid Indenture mentioned. In Debt on the Bond it's a good Aſſignment of the Breach of the Condition, that the Leſſee did not pay him the Rent at the Time of Payment, by the Reſervation, without alledging he demanded the Rent at the Day of Payment, for he is not bound to demand it; but the other ought to pay it without Demand, *Chapman* and *Chapman*, 1 *Rol. Abr.* 460. *Aliter*, if he covenant to pay the Rent, being lawfully demanded. Demand of Rent.

If *A.* lets Land to *B. per* Indenture for Years, reſerving Rent, 20 *l. per Annum*, payable at Four Feaſts by equal Portions; and after *B.* is bound in an Obligation to *A.* upon Condition, that if he pay to *A.* for the Rent of the ſaid Premiſſes, the yearly Rent of 20 *l.* for the Term demiſed, at Four quarterly Days, according to the Tenor and Effect of one Leaſe made, bearing Date with this Obligation, and made between the ſaid Parties, according to the Tenor and Effect of the ſaid Leaſe, by even and equal Portions, then the Bond to be void. The Leſſee is not bound to pay the Rent by this Condition, without any Demand of the Leſſor, for that this refers to the Indenture of Leaſe, and that this ſhall be paid as a Rent, according to the Indenture, *Horn* and *Barber*, ibid. 460. Sir *Tho. Jones* 33.

Indenture to pay Rent, and Bond with Condition to pay the ſaid Rent, referring to the ſaid Indenture, Leſſor muſt demand it.

Two Tenants in Common make a Leaſe, and reverſe a Rent, and covenant that neither ſhould releaſe, and one of them releaſeth his Part; this is a Breach, for that in Debt they ſhould both join, and now by their Releaſe the Action is gone, 1 *Brownl.* 78. *Brock* and *Smith.*

CHAP.

CHAP. XVI.

Pleadings to Action of Covenant for Rent, Annuity, yearly Payments.

UPON a Leaſe for Years, the Reſervation by the Word [*Reddend'*, &c.] and an expreſs Covenant for the Payment of the Rent; and that the Leſſor aſſigned the Reverſion to him and his Heirs, and that the Rent became due at ſuch a Feaſt after the Aſſignment, and was not paid, *Et ſic infregit Conventionem.* The Defendant pleads, That before the Rent became in arrear, the Leſſor had releaſed to him all Covenants and Demands. Plaintiff demurs. *Per Cur'*, Covenant lies upon the Word [*Reddend'*,] but doubted if this Word would maintain Covenant upon a Leaſe for Life. 2. That the Releaſe of the Leſſor, after the Aſſignment of the Reverſion, is no Bar to the Plaintiff, and this by the Common Law, and alſo by *Stat.* 32 *H.* 8. for this Covenant runs with the Reverſion. The Caſe of *Midlemore* and *Goodale*, *Cr. Car.* 503. was of a Collateral Covenant, Sir *Tho. Jones* 102. *Harper* and *Bird*, 2 *Lev.* 206.

Releaſe of the Leſſor after the Aſſignment of the Reverſion.

Collateral Covenant.

Covenant *per* Aſſignees of the Reverſion againſt the Defendant's Leſſees, upon a Special Covenant in a Leaſe for Years, for Payment of the Rent according to the Reſervation, and for Non-payment of the Rent incurred; after the Aſſignment, the Action is brought. One Defendant *nil dicit*, the other Defendant pleads *Actio non*, and pleads a Releaſe by him before the Aſſignment to the

Plaintiff to the other Defendant by the Conſent of the Leſſor, and that the Leſſor had accepted the other ſole Tenant of the Meſſuage, *&c.* and he paid one Rent to the Leſſor, who had accepted it as of his Tenant. Plaintiff demurs. *Per Cur'*, on *Bret* and *Cumberland*'s Caſe, *Cro. Jac.* 522. it is expreſly reſolved, That no Act of the Leſſee can diſcharge him or his Executors of the Special Covenant, of which alſo the Aſſignee of the Reverſion ſhall have Advantage by the *Stat.* 32 *H.* 8. Judgment *pro Quer.* 2 *Bulſt.* 282. Sir *Tho. Jones* 144. *Aſhurſt*'s Caſe.

No Act of the Leſſee can diſcharge him or his Executors of a ſpecial Covenant to pay Rent.

In Action of Covenant for Payment of Rent reſerved in a Leaſe for Years; Defendant pleads, The Plaintiff after the Leaſe made, had ſeparated, taken down, and taken away a Penthouſe fixed to the ſaid Premiſſes demiſed, and detained them before the Rent became due, *Et adhuc detinet.* Plaintiff demurs, and Judgment for him, for this was not a Suſpenſion of the Rent, but a Treſpaſs, for which the Defendant may have his Action, Sir *Tho. Jones* 148. *Roper* and *Floyd.*

No Suſpenſion of a Rent, but a Treſpaſs.

In Action of Covenant upon Indenture, made between the Wife of the Defendant while ſhe was Sole, to the Wife of the Plaintiff, whereby reciting, that ſhe was ſeiſed in Fee of certain Lands, in Conſideration of a Marriage to be had between the Plaintiff and her Son, did grant to the Plaintiff a Rentcharge out of theſe Lands, *Habend'* after the Death of her Son, and covenanted to pay it, *&c.* The Defendant pleaded, that ſhe had not been long in the Land at the Time of the Grant, but that a Stranger was ſeiſed of it. Upon Demurrer it was adjudged *pro Quer'*, both becauſe the Defendant is eſtopped

Defendant pleads, *Nihil habet in Tenementis.*

eſtopped by the Deed, and that the Covenant extends to it as an Annuity, *Allen* 79. *Newton & Uxor* verſus *Weeks & Uxor*.

A Leaſe for Years of Land by Deed, rendring Rent. Leſſee binds himſelf in a Bond of 10 *l.* to perform all Covenants and Agreements contained in the Deed. The Rent is behind, and Leſſor brings Action of Debt on the Bond, for Non-Payment. Obligor pleads Performance of all Covenants and Agreements. The Leſſor ſaith, the Rent is behind. It's no Plea for the Obligor to ſay, the Rent was never demanded: But in this Bar he ought to have pleaded, That he had performed all Covenants and Agreements, except the Payment of the Rent; and as to that, that he was always ready to to have paid it, if any had come to demand it. But as to the firſt Plea, it was held not to be good. But if the Leſſee be particularly expreſſed by Covenant to pay the Rent, there he is bound to do it without any Demand, *Godb.* 95. Vid. Infra, *Chapman's* Caſe.

Where Demand of the Rent muſt be pleaded or not.

Covenant to pay Rent, Action is brought for Non-payment. Defendant pleads, levied by Diſtreſs. It's no Plea.

Levied by Diſtreſs pleaded.

Error of a Judgment in Action of Covenant in *Durham*, where Action was brought upon a Leaſe for 21 Years, and Leſſee covenanted to pay 20 *l. per Annum per æquas Portiones*, at *Michaelmas* and *Lady-Day*, and aſſigns a Breach that he did not pay the Rent, *Debit ad præd' ſeperales Feſtos durante termino præd'. Per Cur'.* Judgment by Default: Writ of Enquiry, and then the Breach is well aſſigned, *Recuperet*, tho' not ſo particularly, for perhaps it was never paid at any of the Days, 1 *Lev.* 78. *Conyers* and *Smith.* Plead-

Pleading a Releaſe of all Demands to Action of Covenant for Rent, *Henry Hawſon's* Caſe, *Sid.* 141. and 1 *Keb.* 510.

Condition to perform Covenants in an Indenture, whereby he let Land, rendring Rent 10 *l. per Annum* at ſuch a Feaſt, or within Six Days after the Feaſt. Defendant pleads Performance. Plaintiff aſſigns a Breach, That he ſuch a Day, being the Sixth Day after the Feaſt, before Sun-ſet, demanded 5 *l.* Rent then due, and that neither the Defendant nor any for him was ready to pay it. *Per Cur'*, he need not ſhew the certain Time when he came, nor how long he remained there. *Obj.* This Demand was not good, becauſe he demanded as a Rent then due, for he ought to have demanded as a Rent due the laſt Feaſt: But *per Cur'*, it is not due to be demanded till the Sixth Day, tho' the Tenant if he will may pay it before, *Cr. Jac.* 499. *Tompſon* and *Field.*

Debt on Bond to perform Covenants; and one was, That the Defendant pay 12 *l. per Annum*, for a Meſſuage to him demiſed, quarterly. The Defendant pleads Performance of Covenants. Plaintiff aſſigns for Breach, that he did not pay 3 *l.* one Quarter's Rent. Defendant rejoins before the ſaid 3 *l.* was due, The Plaintiff entered upon him and expelled him. Plaintiff demurs, for the Rejoinder is a Departure, and ſo ruled. *Per tot' Cur'*, there was cited a Difference out of *Cr. Cr.* 76. where the Condition is to perform all Covenants contained, and where it's all Covenants and Payments, there the Defendant pleaded Performance of all. Plaintiff aſſigned a Breach in Non-payment of Rent. The Defendant cannot rejoin that it

Entry and Expulſion pleaded.

it was not demanded, for it is a Departure; *Raym.* 22. *Granger* and *Hemborough.*

In Covenant for Rent, *Nil debet* may be pleaded, the Covenant doth not alter the Rent, *Vide Infra.* But *Grainger* and *Hemborough*'s Caſe is more particularly reported in *Rolls.* *Nil debet.*

Debt on Bond for Performance of Covenants; Defendant pleads Performance generally. Special Breach is for Non-payment of Rent. Defendant rejoined, that the Plaintiff entered before the Rent-Day. *Per Cur'.* it is a Departure (but in *Baker* and *Spaines*, *Hob.* 7. it was alledged in the Rejoinder, there was no Demand made); but all agreed, that in Action of Covenant this Rejoinder had not been good. But by *Windham* it's a Departure, and not like the Caſe of Demand, which is neceſſary to make the Rent due, whereas this is only an Excuſe of what he confeſſeth, 1 *Cr.* 76. *Chapman*'s Caſe. By *Twiſden* it ſhould have been pleaded, That the Defendant had performed Covenants ſpecially, paying his Rent till ſuch a Day, and that the Leſſor entered, and ſo agreed. *Per Cur'*, but this general Performance is intended of an actual Performance. And by *Twiſden*, upon general Performance pleaded, the Plaintiff replies, Rent-Arrear; the Defendant cannot rejoin by Want of a Demand, tho' he might have excuſed himſelf by pleading a Tender in Bar, 1 *Keb.* 115, 178, 185, 283. *Grainger* and *Hemborough.* Entry before the Rent-Day pleaded. Departure in Pleading.

Covenant, Breach in Non-payment of Rent according to the Covenant in the Indenture. Defendant pleads *Nil debet*; *Nil debet* is no Plea in this Caſe upon the Indenture, adjudged upon general Demurrer, 3 *Lev.* 170. *Tindall* and *Hutchinſon.* *Nil debet* no Plea.

Cove-

In Debt or Covenant upon a Deed not indented. Plea *Nil habuit.*

Covenant upon a Deed not indented, and declares upon a Leaſe of certain Land to the Defendant, rendring Rent, and covenants to pay it, and aſſigns Breach in Non-payment. Defendant *proteſtando*, that he did not enter nor occupy the Land, as the Plaintiff had ſuppoſed. *Pro Placito dicit*, That the Plaintiff, *Nil habuit in Tenementis tempore dimiſſionis.*

Repl. *Habuit*, without naming what Eſtate, ill.

Plaintiff replies, *Quod habuit bonum totulum unde potuit dimittere.* Defendant demurs generally, and the Court held the Replication ill, not ſhewing what Title he had, according to *Crok.* 2. 312. And this notwithſtanding it was not by Indenture, and it is all one in Debt for Rent; for if there is not any Rent, there is not any Covenant to pay the Rent; 3 *Lev.* 193. *Aylet* and *Williams.*

Covenant to pay to the Defendant's Wife (on Separation) 50 *l. per Annum*, and for Non-payment the Separation continuing, the Action is brought; but upon *Oyer* it was, *Proviſo* that the Wife would live at ſuch a Place as *N.* and *W.* appointed. Defendant pleads, She did not live at ſuch a Place as *N.* and *W.* appointed. The Plaintiff replies, That ſhe was always ready to live at any ſuch Place, but that *N.* and *W.* appointed no Place. Defendant demurs, as being a Condition Precedent. But *per Cur'*, this is not a Condition Precedent, but a Condition Subſequent, and in Defeaſance. The Covenant being in purſuance of a former abſolute Agreement to pay ſo much, and it is like the Aſſent of the Husband, which is intended till the Contrary appear, and here muſt be an Appointment: And Judgment *pro Quer.* 3 *Keb.* 229, 363. *Leech* and *Beere.*

Condition Subſequent and not Precedent.

In

In Action of Covenant, the Defendant cannot plead the Plaintiff *Nihil habuit in Tenementis*, though ſuch Plea is good in Action of Debt for Rent, 2 *Ventr.* 99.

If Rent be reſerved out of a Thing Incorporeal, and there is an expreſs Covenant to pay it: Qu. If he may plead Eviction? *Allen* 79. One reciting that he was ſeiſed of Land, granted a Rent out of it, and covenanted to pay the Rent; he could not plead to his Covenant that he had nothing in the Land, 2 *Ventr.* 69.

Entry and Suſpenſion.

Covenant for not paying of Rent. Defendant pleads Entry and Suſpenſion. Plaintiff replies, The Defendant did re-enter, and ſo was poſſeſs'd of his former Eſtate, it's an ill Replication, for they ought to ſhew that he entered and was poſſeſs'd till the Rent grew due.

What will make a Suſpenſion of Rent.

Note, To make Suſpenſion of a Rent reſerved on a Leaſe for Years, the Leſſor muſt ouſt the Leſſee of Part of the Thing let at leaſt, and hold him out till after the Day on which the Rent is payable; and if the Leſſe re-enter, the Rent is revived, *Stiles p.* 432. *Page* and *Parr*.

That no Rent is behind, an ill Plea in Covenant.

Covenant, on a ſpecial Covenant, to pay Rent at certain Days. The Defendant pleads, That no Rent was behind. It is an ill Plea in Covenant, for by that Plea the Defendant confeſſeth the Covenant broken, and that Plea tends but in Mitigation of Damages, 1 *Brownl.* 19. *Hare* and *Surle*.

Levied by Diſtreſs.

But in *Brownlow's 2d Part*, this Caſe is reported, 273, that the Defendant levied by Diſtreſs. By this Plea the Defendant confeſſeth, that it was not paid according to the Reſervation, for the Plaintiff cannot diſtrain if

if it were not behind after the Day; but Payment at the Day had been a good Plea.

Payment at the Day.

A. leaſed to *B.* Land for 40 *l. per Annum*, and a Stranger covenanted with *A.* that *B.* ſhould pay him 40 *l.* for the Farm and Occupation of the ſaid Lands. *A.* brought Covenant, Defendant pleads, that before the Day of Payment the Plaintiff put the ſaid *B.* out of his Farm. *Per Cur'*, it's a good Plea, for the Defendant hath covenanted that the Leſſee ſhall pay for the ſaid Farm and Occupation 40 *l.* ſo it is as a Conditional Covenant, and here is *Quid pro quo*. And here the Conſideration upon which the Covenant is conceived, *(viz.)* the Farm and the Occupation of it, is taken away by the Act of the Plaintiff himſelf, 3 *Leon. p.* 159. 2 *Leon.* 115. *Beadle's* Caſe.

Expulſion.

Covenant that the Leſſee ſhall pay for the Farm and Occupation ſo much.

Debt on Bond for Performance of Covenants, Articles, *&c.* contained in a Leaſe for a Year. Defendant pleads Performance of Covenants. The Plaintiff replied, That the Defendant did not pay the Rent reſerved upon the Leaſe at ſuch a Day, according to the Form and Effect of the Condition of the Obligation. Defendant rejoins, and alledgeth an Entry by the Plaintiff into the Land leaſed before the Rent, and that he kept Poſſeſſion till the Rent-day was paſs'd. On Iſſue found *pro Quer'*, the Defendant moved in Arreſt of Judgment, for that the Plaintiff ſaith the Defendant paid not his Rent according to the Form, *&c.* of the Condition of the Obligation, whereas there is no Mention of any Payment of the Rent in the Condition of the Bond, but in the Leaſe only, *Sed non allocatur*; becauſe the Defendant by this Rejoinder has confeſs'd that ſuch a Rent

Entry and Expulſion.

That the Defendant did not pay the Rent according to the Form and Effect of the Condition of a Bond to perform Covenants.

was Arrear, and has waved taking Iſſue upon it, and taken Iſſue upon another Matter, and therefore this ſhall be well enough after a Verdict. And *per Hale C. B.* it is all one in Subſtance to plead as the Plaintiff has done, and to have pleaded *Secundum formam & effectum Indenture*, for the Condition of the Bond comprehends all that is comprehended in the Leaſe, *Hardr.* 319. It might have been a Queſtion, had it been upon Demurrer.

Bond on Condition to perform Covenants in a Leaſe. One was, That he ſhould pay 40 *s.* yearly at the Feaſt of the Annunciation, or within Fourteen Days after; and the Breach aſſigned was for Non-payment at ſuch a Feaſt in ſuch a Year. Defendant ſaid, he paid it at the Feaſt on which they were at Iſſue, and on Evidence it appeared that the ſame was not paid at the Feaſt, but in Eight Days after it was paid. *Per Cur'*, by his pleading that he paid it at ſuch a Day certain, and tendring that for a Special Iſſue, he hath made it part of the Iſſue; but if he had pleaded that he had paid it within Fourteen Days, (*viz.*) the Eighth Day, that had not made the Day Parcel of the Iſſue; but then he might have given Evidence that he paid it at another Day within the Fourteen Days. Qu. If the Breach be well aſſigned, in ſaying he had not paid it at the Feaſt, without ſaying, nor within the Fourteen Days? *Godb.* 100. *Plymton's* Caſe, & 10 *fo.*

Defendant pleads he paid it at the Feaſt.

Where the Day is made Part of the Iſſue.

Error in the *Exchequer-Chamber* of a Judgment in Debt in *B. R.* on Bond of 200 *l.* conditioned, That if the Obligor ſhould at all Times well and truly pay, perform and keep, all and ſingular the Rents, Covenants, Grants, Articles, Payments and Agreements, which on

On Bond to perform Covenants where Demand of Rent need not be alledged.

on his Part, *&c.* Defendant pleads generally Performance of all Covenants. Plaintiff replies, and ſhews a Breach for Non-payment of the Rent at ſuch a Time, but doth not ſhew any Demand of that Rent; whereupon the Defendant demurred, and it was adjudged *pro Quer.* Now the Defendant aſſigned for Error, that for as much as the Condition of the Bond is general, and not particulariſed for the Payment of the Rent, the Rent is not payable without Demand, and therefore the Breach was not well aſſigned. *Cur' contra*, and that the Judgment is well given, for he pleading Performance of the Payments, Covenants and Agreements, it ſhall be intended he had really performed them, and ſo had paid all the Rents; and when the Plaintiff replies, that he had not paid ſuch a Rent, he need not to alledge a Demand, for the Defendant may not ſay it was demanded, for then it ſhould be a Departure from his Plea; and yet the Obligation being general for Performance of Covenants, doth not alter the Nature of the Rent, but that it ought to be demanded, *Cr. Car.* 76. *Chapman's* Caſe, *Hutton* 90.

In Covenant, Plaintiff declares, That ſhe was poſſeſs'd of certain Houſes in St. *Martin's* Lane for a Term of Years, and that ſhe demiſed the ſaid Houſes to *R. G.* for Twenty one Years, under a certain Rent, which he covenanted to pay; that before the ſealing of the Leaſe, it was indorſed for the Payment of 12 Bottles of *Canary* Wine every Year to *Chriſtian Tovy* the Leſſor. Leſſee entered and made his Will, and made *Suſan Gill* ſole Executrix, ſhe entered, and aſſigned the Term to the Defendant, who entered, *&c.* and aſſigned the Breach in Non-payment of the

Twenty four Bottles of *Sack*, which was due for Two Years, and alſo for Arrears of Rent after the Aſſignment made to him by the ſaid Executrix. Defendant pleads, That before the ſaid Wine and Rent became due, he aſſigned his Intereſt to *James Mott*, but did not plead Notice given to the Plaintiff, or that ſhe had accepted the Rent. Judgment on Demurrer in *B. C.* was given *pro Quer'*, and Writ of Error brought. Now in *Keighly* and *Bulkly*'s Caſe, 1 *Sid.* 338. Debt was brought for Rent by Aſſignee of a Reverſion againſt the Aſſignee of a Term, who pleaded, that he had aſſigned over his Intereſt, but not that he had given Notice of the Aſſignment; he was adjudged ſtill Tenant, becauſe he had not given ſuch Notice; but by *Twiſden* he need not give Notice. Error was brought in that Caſe, and C. J. *Hales* and *Bridgman* were of Opinion, that Notice was not neceſſary; but in the principal Caſe, Judgment was given for the Defendant in the original Action, and the Judgment in the *Common-Pleas* reverſed. It was held, that the Aſſignee was chargeable by Reaſon of the Land, and when he had parted with his Intereſt, there could be no Reaſon given why he ſhould be any longer liable, eſpecially ſince the Executor of the Leſſee is ſtill bound to perform the Covenants in the Leaſe ſo long as ſhe hath Aſſets; and that was the true Reaſon of *Heliar* and *Casbard*'s Caſe, 1 *Sid.* 266. Vid. 2 *Ventr.* 228. 3 *Lev.* 295. 4 *Mod.* 71. *Pitcher* and *Tovey*, 1 *Sid.* 338. *Kightly* and *Bulkly*, 1 *Lev.* 215.

In Action of Covenant, declaring of a Leaſe by Deed for Twenty one Years, upon a Special Covenant to pay the Rent. The

Defendant pleads a former Leaſe made by Bargain and Sale to one *Allen*, by the Leſſor for 1000 Years, but no Entry is alledged of the firſt Leſſee; to which the Plaintiff demurred on 4 *Rep.* 53. *Dier* 256. becauſe no expreſs Eviction is made of the Eſtate, but only of the Poſſeſſion, and eſpecially becauſe no Entry is alledged. *Twiſden* agreed this a good Leaſe by Way of *Eſtoppel*, and if the Rent be in being, the Covenant remains; *è converſo*, if not; which the Court agreed: But it being ſaid that *Allen* was attainted by Reaſon whereof, and of the Statute 13 *Car.* 2. it came to the Crown. This is a ſufficient Eviction, without any Entry or Office alledged, and the King is in actual Poſſeſſion as much as if the Party had actually entered, altho' a common Perſon ſhould not be in actual Poſſeſſion without Entry by himſelf or the firſt Leſſee; and Judgment *pro* Defendant: For this cannot be good as a Leaſe in Reverſion, being not ſo pleaded, but as a Grant of a preſent Eſtate; and being a Leaſe extracted out of the Inheritance, there needs no Attornment be alledged, being by Bargain and Sale. But all agreed, that upon Aſſignment of Leaſe there muſt be Attornment, and in both, ſpecial Notice muſt be given by the Aſſignee as to Penalties, tho' not as to the Rent. The Plaintiff hath declared of a Leaſe in Poſſeſſion, as at Common Law, is avoided by Eviction, 2 *Keb.* 444. *Banckes* and *Smith*, vid. 1 *Sid.* 349.

A good Leaſe by Way of Eſtoppel.

Eviction by Attainder, the King is in Poſſeſſion.

But not a common Perſon before Entry.

Attornment.

Aſſignment.

In Action of Covenant expreſs to pay Rent, againſt the Leſſee he pleads Aſſignment and Acceptance; to which the Plaintiff demurred, becauſe he hath Election, notwithſtanding his Acceptance of Rent of the Aſſignee, which

Aſſignment and Acceptance pleaded.

which the Court agreed on, 1 *Cr.* 503. *Midlemore* and *Goodale's* Caſe, albeit this doth continue as a Rent. Judgment *pro Quer'*, 2 *Keb.* 640. *Chapman* and *Cantrell.*

Covenant by Aſſignee of the Reverſion about Repairs of Ruin before his Intereſt granted.

Maſcall let a Houſe for Years to *A.* by Inture, by which *A.* covenanted with *M.* to repair the Houſe, and that *M.* ſhould enter to ſee in what Plight the Reparations ſtood, and if Default was found, and thereof Warning be given to *A.* his Executors, *&c.* then within Four Months after ſuch Warning the Default ſhould be amended. The Houſe in the Default of the Leſſee became ruinous, *M.* granted the Reverſion over in Fee to *C.* who upon View of the Houſe gave Warning to *A.* of the Default, which is not repaired; upon which *C.* as Aſſignee of *M.* brought Covenant. It was moved, the Action did not lie, becauſe the Houſe became ruinous before his Intereſt in the Reverſion. *Sed per Cur'*, the Action is not conceived upon the ruinous Eſtate of the Houſe, but for not repairing it within the Time appointed by the Covenant after the Warning, 1 *Leon. p.* 62. *Maſcall's* Caſe.

CHAP. XVII.

Covenant for Payment of Rent, where to be tried.

Aſſignee of the Reverſion ſhall have Covenant againſt the Leſſee where the Leaſe was made.

ASſignee of the Reverſion ſhall have Covenant againſt the Leſſee where the Leaſe was made, for Covenant goes only in Privity of Contract; and altho' now by the Statute the Covenant paſſeth to the Aſſignee, yet the Nature of it is not altered by the Statute; but it is aſſignable only as a Contract, and therefore ought to be brought where the Contract was made, otherwiſe in Debt for Rent, *Vid.* 1 *Lev.* 259. *Thurby* and *Plant*, 1 *Sand.* 237. 1 *Sid.* 401.

Covenant was brought for Non-payment of Rent, upon a Demiſe of Allum-Mines. Defendant pleads, the Plaintiff incloſed the Mines, ſo that the Defendant could not have Ingreſs to the Work, and this tried at *London*, where the Covenant was alledged to be made, moved that this was a Miſtrial; but this is aided by the *new Stat.* 16 & 17 *Car.* 2. *c.* 8. *An Act to prevent Arreſts of Judgment.* Sir *Tho' Jones* 82. *Aynſworth* and *Chamberlain.* Yet in the Caſe of *Crofts* and *Winter*, *Hill.* 20 & 21 *Car.* 2. *B. Regis* held the contrary, ſee the Caſe of *Gerrard* and *Holland*, 2 *Cro.* 43. But by the latter Opinion this is aided by the ſaid Statute.

Stat. 16 & 17 *Car.* 2. *c.* 8.

Damages.

Damages.

A Man made a Leaſe for Years; Leſſee covenants to make Reparation, Leſſor grants the Reverſion to another, and Leſſee for Years made his Wife Executrix and died. *Per Cur'*, the Grantee of the Reverſion ſhall not recover Damages but from the Time of the Grant, and not for any Time before, and yet the Executrix (the Wife) ſhall be charged for not Reparation, as well in the Time of her Husband, as in her own Time; and if ſhe do make Reparation depending the Suit, yet thereby the Suit ſhall not abate, but it ſhall be a good Cauſe to qualify the Damages, 3 *Leon.* 51. by *Manwood.* In this Caſe, by the Recovery of the Damages the Leſſee ſhall be excuſed ever after for making Reparations, for the Covenant is extinct.

A Copyholder in Fee made a Leaſe of a Meſſuage for Twenty one Years, warranted by the Cuſtom, *&c.* Leſſee covenanted to repair during the Term. Leſſor grants the Reverſion to his Son, who ſurrendered to the Plaintiff, who brought Action of Covenant againſt the Leſſee for not repairing. Qu. was, Whether it will lie, becauſe it's a Copyhold? And ſo not within the *Statute* 32 *H.* 8. *c.* 34. *Per Cur'*, a Copyholder hath an Inheritance, and his Eſtate is eſtabliſh'd by Cuſtom, and it's Reaſon to conſtrue him within the Equity of this Statute, 4 *Mod.* 80. 3 *Lev.* 326. *Glover* and *Cope.*

If one covenant to keep and leave an Houſe in the ſame on as good Plight as it was at the Time of the making the Leaſe; in this Caſe the ordinary and natural Decay

of it is no Breach of the Covenant, but the Covenantor is hereby bound to do his beſt to keep it in the ſame Plight, and therefore to keep it covered, *&c. Fitzh. Covenant* 4.

If one covenant to leave a Wood in the ſame Plight he finds it, and he cuts down Trees, the Covenant is broken preſently, for now it is become impoſſible by his own Act to be performed. *Aliter*, in caſe ſome of the Trees be blown down, for now it is become impoſſible to be done by the Act of God, and the Covenantor is not bound to ſupply it.

In a Covenant to ſuſtain Houſes, Seabanks, or covenant to leave them in as good Caſe as one doth find them, and the Houſes be burnt or thrown down by Tempeſt, or the Banks overthrown by a ſudden Flood, in this Caſe the Covenant is not broken by theſe Accidents only; but if the Covenantor do not repair and make up theſe Things in convenient Time, the Covenant will be broken, *Fitz. Covenant* 29. 5 *Rep.* 15. 1 *Rep.* 98. *Perk. Sect.* 738. *Plo.* 229.

If Houſes are let to me for Years, and I covenant to leave them in as good Plight as I find them, and I throw down the Houſes; this is no Breach of the Covenant, for I may re-edifie them, and ſo no Action will lie upon this Covenant till the End of the Term.

Covenant for Reparations.

Magd. Coll. Oxon ſeized of an Houſe and a Mill, demiſed it to *Lewin* for 31 Years; *Lewin* let the Mill to *J. S.* for 5 Years, and afterwards demiſed the Houſe and Mill to *Forth*, by Indenture for 31 Years; *Forth* covenanted to repair the Premiſſes, *durante Termino prædicto*, of 21 Years, *J. S.* refuſed to Attorn; and whether *Forth* were bound to repair the Mill was the Queſtion, becauſe it was alledged, That the Covenant was to repair during the Term, and nothing in the Mill paſſed during the 5 Years, for want of Attornment. *Per Cur'*, he is bound to repair, though the Leaſe did not commence in Point of Intereſt, yet it did in Point of Computation; and this Covenant was to repair during the Term of 31 Years. 1 *Vent.* 185. *Lewin* and *Forth.* 2 *Keb.* 879.

Leaſe commencing in Point of Intereſt, or in Point of Computation.

Defendant covenants, That *ab & poſt emendationem & reparationem dicti Meſſuagii*, by the Plaintiff, he at his proper Coſts and Charges, as Need ſhall require, ſhould well and ſufficiently repair and ſuſtain the ſaid Houſes: The Defendant is not to repair it till the Plaintiff hath firſt repaired it; and though it were in good Reparations at the beginning, if it afterwards happen to decay, the Plaintiff is firſt to repair it, before the Defendant is bound thereunto, for this is not within the Reach of the Covenant, if the Leſſor do not firſt repair them. *Cro. Jac.* 645. *Slater verſus Stone*, 2 *Rol. Rep.* 248. *Meſme* Caſe. *Vide infra*, *Bray* and *Nightingale's* Caſe *contra*, for there is a Covenant by the Leſſor to Repairs, and ſo mutual Covenants.

Defendant covenants after Repairs by the Plaintiff he will ſuſtain it, Defendant is not bound to repair it till the Plaintiff hath repaired it.

Leſſor covenants to repair during the Term, if Leſſor will not do it: Leſſee may do it, and pay himſelf by Way of Retainer. 1 *Leon.* 237. *Beale* and *Tayler.*

Dimiſſa præd' Reparare.

Covenant is to erect Three Meſſuages, and *dimiſſa præd' reparare,* and the Covenantor erects 5 Meſſuages, he is bound to keep all in repair. 3 *Levin.* 264, 265. 2 *Vent.* 126. *Douſe contra Earle.*

King's Patentee bound to repair.

In the King's Letters-Patents there is a Clauſe for the Patentee's repairing; though this is by Patent, wherein the Leſſee takes only, yet that Clauſe ſhall be taken and interpreted as a Covenant on the Leſſee's Part to bind him, and his Aſſigns; for when he takes by the Patent, he conſents to all Things therein; and the Words in that Clauſe, [for the leaving and keeping the Houſes and Fences in Repairs,] are as ſpoken by him, and it is a Covenant which runs with the Land; and though the Bargainee be not named Aſſignee in the Declaration, it's good enough. *Cro. Jac.* 240. Lord *Ewer* and *Strickland.*

One lets a Leaſe of Houſes, Courts, Orchards and Gardens, appertaining to them; Defendant covenants to repair the Houſes, Edifices and Buildings, with neceſſary Reparations, and that he would maintain and keep *dimiſſa Præmiſſa,* with Pailing and Fencing, and at the End of the Term would leave *Domos & alia Præmiſſa,* ſufficiently maintain'd, repaired, pailed and fenced; and ſhews, that at the Time of the Leaſe the Houſes were well repaired, and that afterwards, *diverſa Domus loca parcella, & res eorundem Tenementorum decaſual' dirupta & fracta fuer' & in decaſu devener' & diverſæ aliæ percellæ & res eorundem*

rundem Tenementorum & Præmiſſorrum eiſdem Præmiſſis affixa ab inde avulſa & aſportat' fuer' prout ſequitur; and inſtanceth in the Pavement of the Court, carrying away the Locks and Keys of a Cupboard, the breaking of the Glaſs in the Windows, carrying away of a Shelf, which was not ſhewed to be fixed; it was objected, That the Breach for not repairing the Pavement is out of the Covenant, for it is neither Building, Pailing, nor Fencing. *Sed per Cur'*, It is within the Intention of the Covenant, and it is *quaſi*, the Building, and within the Words, [leave them ſufficiently repaired] and the Shelf need not be ſhewed that it is fix'd. *Cro. Jac.* 329. 2 *Bulſtrode* 112. *Pyot* and Lady *St. John.*

Pavement, *quaſi* the Building.

There is a Caſe in 3 *Leon.* 51. A Man made a Leaſe for Years, and the Leſſee covenanted to make Reparations. Leſſor granted the Reverſion to another, Leſſee for Years made his Wife his Executrix, and died. *Per Cur'*, the Grantee of the Reverſion ſhall not recover Damages, but from the Time of the Grant, and not for any Time before; but yet the Wife, the Executrix, ſhould be charged for the not Reparation, as well in the Time of her Husband, as in her own Time; and if ſhe do make the Reparation depending the Suit, yet thereby the Suit ſhall not abate, but it ſhall be a good Cauſe to qualify the Damages, according to that which may be ſuppoſed that the Party is damnified for the not Repairing, from the Time of the Purchaſe, to the Time of the bringing the Action; and by *Manwood*, by the Recovery of the Damages, the Leſſee ſhall be excuſed ever after for making of Reparations; ſo as if he ſuffer the Houſes for want

Grantee of the Reverſion not to recover Damages, but from the Time of his Grant.

want of Reparations to decay, that no Action ſhall be brought for the ſame thereupon afterwards, but the Covenant is extinct.

It is agreed the Leſſee ſhall keep the Houſe in good Repairs, the Leſſor putting them in good Repair, Covenant lies againſt the Leſſor upon theſe Words. 1 *Sid.* 423. *Prettyman* and *Thon*, cited 1 *Rol. Abr.* 518.

CHAP. XVIII.

Covenant for Reparation. Declaration.

THE Defendant, by Indenture upon a Leaſe made unto him of an Houſe, covenanted, That he would from Time to Time, during the Term, after 3 Months Warning, ſufficiently repair, and at the End of the Term leave it ſufficiently repaired to the Leſſor, *&c.* and for not leaving it ſufficiently repaired at the End of the Term, Action was brought; and ſhews, in what Part, *&c.* Defendant demurred, becauſe he doth after not alledge, That he for 3 Months before gave Notice unto him of the Defects. But *per Cur'*, the Declaration is good, notwithſtanding that Exception; for the Clauſe, [To leave it well repaired at the End of the Term,] is diſtinct by it ſelf, and doth not depend upon the former Clauſes; for he ought to leave it ſufficiently repaired without Notice, at his Peril; and the Notice within 3 Months refers only to the Reparations within the Term, whereto he is not tied without

Three

Three Months Notice before. *Cro. Jac.* 644. *Harfleet* and *Butcher.*

In Covenant for not repairing an Houſe, being *in Decaſu*, and not ſaid wherein; to which the Plaintiff demurred, and ſhewed for Cauſe, that it was not particularly ſet forth wherein it was in Decay; which *per Cur'*, is ill as well as in Waſte. 3 *Keb.* 478. Counteſs of *Portland verſus Andrews.*

Shews not wherein the Houſe was in Decay.

The Plaintiff let Houſes for Years to the Defendant, and covenanted to repair the Houſes by ſuch a Day; the Defendant by the ſame Indenture covenanted with the Plaintiff, That from the Time that the Plaintiff was to repair the Houſes, unto the End of the Term, he would repair and leave them ſo repaired; and for not performing this Covenant on the Defendant's Part, the Plaintiff brought his Action. Defendant demurred to the Declaration, becauſe the Plaintiff had not ſhewed for his Part that he had repaired the Houſes according to the Covenant, and ſo the Declaration ſuppoſed he was not bound to repair, becauſe he was bound to repair from the Time that the Plaintiff had repaired them, and not before, and ſo no Cauſe of Action, by *Rolls* in *Brag* and *Nightinghall's* Caſe. *Stiles* 140. Theſe are Reciprocal Covenants, if one doth not perform the Covenants on his Part, it doth not excuſe the other. *Vide* this Caſe in 1 *Rol. Abr.* 416.

Plaintiff covenants to repair by a Day, and the Covenants to repair after the Day are mutual Covenants.

The Covenant of *A.* to repair it before *Midſummer*, is not a Condition Precedent, but only the Time divided and mutual between *A.* and *B. (viz.)* That *A.* ſhall repair it before *Midſummer*, and *B.* after during the Term, for which each of them may have his Remedy by Action againſt the other.

The

The Aſſignee of a Reverſion may maintain Covenant for Repairs, though not named in the Covenant in the Leaſe. 1 *Lev.* 109. and likewiſe may maintain Covenant in the County where it's ſuppoſed to be made; *aliter* in Debt, *ibid.*

Shews not that the Racks were fixed to the Stable.

Covenant, That the Defendant ſhall put in good Repair, the Houſes, Out-Houſes and Stables; the Breach was, That the Defendant permitted the Racks in the Stable to be in Decay. It was moved in Arreſt of Judgment, that the Plaintiff did not ſet forth that the Racks were fix'd in the Stable, and ſo Part of the Freehold. By *Pollexfen*, it ought to have been ſhewed, that the Racks were ſet up and fixed, *alii Juſticiarii contra.* It ſhall be intended they ſhall be fixed for the Uſe of the Stable. 2 *Ventr.* 214.

Neceſſary Timber to be allowed by Leſſor.

Covenant, That the Leſſee ſhould repair the Houſe, provided, and it was agreed, that the Leſſee ſhould have neceſſary Timber to be allowed and delivered by the Leſſor; the Leſſor allowed ſo many Loads of Timber, and a general Requeſt was laid: The Plaintiff ſhould have alledged a Special Requeſt to the Defendant, it was laid in the Declaration that a Stranger brought the Timber, which was all, for that amounted to an Entry on the Leſſee's Poſſeſſion, 1 *Brownl.* 23. *Holden* and *Taylor.*

Covenant to find Meat, Drink, Apparel, and other Neceſſaries, and ſhews not what thoſe Neceſſaries were.

Error of a Judgment in *Northampton*, in a Writ of Covenant; the Error aſſigned was, That the Declaration there was ill, becauſe he declares of a Covenant, whereby the Defendant covenanted to find the Plaintiff with Meat, Drink, Apparel and other Neceſſaries, and doth not ſhew in particular what other Things were Neceſſaries, and the Breach was

was aſſigned as general as the Covenant, (*viz.*) That he did not find him with Meat, Drink, Apparel and other Neceſſaries, and doth not ſhew in particular what other Things were neceſſary or not: And *per Cur'*, the Declaration was ill. *Cro. Jac.* 486. *Mills* and *Aſtell.*

Covenant not to cut down more Timber than ſufficient for Reparations.

Leſſee covenants, That he would not cut down more Timber growing than ſufficient for needful Reparations of the Building: The Plaintiff aſſigns a Breach, That he had cut down Timber to the Value of 10 *l.* and converted it to his own Uſe. Verdict *pro Quer.* *Per Cur'*, it's Erroneous, it is not the ſame Covenant, and ſo no Breach if he had converted it to his own Uſe, except it be averred that he had cut down more than was neceſſar for Reparations. *Stiles p.* 5. *Wingfield* and *Sherwood.*

Pleading in the Disjunctive.

Defendant covenanted, That he, his Executors and Aſſigns, would repair a Mill, and alledgeth, That the Mill was defective in Reparations; and the Defendant, his Executors and Aſſigns, did not repair it. The Declaration was demurred to, becauſe he did not alledge that he, nor his Executors or Aſſigns, did not repair it. *Per Cur'*, it ought to be alledged in the *Disjunctive*, not in the Conjunctive. *Cro. Eliz.* 348. *Colt* and *How.*

Covenants for Reparation, Building, Pleadings.

In Covenant to repair, and ſo to leave the Premiſſes repaired; in the Declaration the Plaintiff ſhews the Breach in Sixty Rood, *&c.* Defendant pleads, That one Barn was pulled down by the Plaintiff's Conſent; and as to the

The Breach aſſigned *in hoc*; Whereas the Defendant being Leſſee for Years, covenanted at the End of the Term to leave and yield up the Tenements well repaired to the Plaintiff, and that he had not left, *&c.* Defendant pleaded, That one *Blunt* was ſeiſed in Fee until by the Plaintiff diſſeiſed, who let to the Defendant; and afterwards *Blunt* re-entered, who infeoffed *J. S.* who is yet ſeiſed, *&c.* adjudged upon Demurrer a good Bar, *Cr. Eliz.* 656. *Andrews* and *Needham.*

Bar by Diſſeiſin.

Leſſee covenants to repair the Houſe well from Time to Time, during the Term, and at the End of the Term to leave the ſame well repaired to the Leſſor; and aſſigns for Breach, that he did not leave it well repaired at the End of the Term; the Breach is good, tho' he doth not ſhew in what Point it is not repaired: But if the Defendant had pleaded, that at the End of the Term he had delivered it up well repaired; then, if the Plaintiff will aſſign any Breach, he ought to ſhew in what Particular it was not repaired, ſo as the Defendant might give particular Anſwer to it, *Cr. Jac.* 170. *Hancock* and *Feild.*

It ſufficeth to aſſign the Breach as general as the Covenant is.

The Plaintiff declares (*inter alia,*) of a Covenant to repair all the Pales of a Garden demiſed, (exceping the Pales on the Eaſt-Side) and aſſigned a Breach in not repairing the Pales *contra formam Conventionis*; but ſhews not that the Defect was in the Pales not excepted. Defendant pleads, He had repaired the Pales according to the Covenant, and Iſſue upon it, and Verdict *pro Quer.* It was moved in Arreſt of Judgment, that the Breach was not ſufficiently alledged, for the Defect might be in the Pales excepted, *Sed non*

Covenant to repair all the Pales (except Breach aſſigned); but ſhews not the Defect was in the Pales not excepted.

non allocat', for it ſhall be intended after a Verdict, who had given Damages to the Plaintiff, that the Defect was in the Pales to be repaired by the Covenant, *Et eo potius*, becauſe the Iſſue was as to Repairs according to the Covenant; but it was agreed, if the Deft' had demurred, Judgment ought to have been given for him, Sir *Thomas Jones*, *B. R.* 125.

Diſcharge of all Reparations pleaded.

The Plaintiff aſſigned a Breach in Non-reparations; Defendant pleads, the Plaintiff had acquitted and diſcharged him of all Reparations. Plaintiff demurred. *Per Cur'*, this is an Acquittance and Diſcharge of the Reparations for the Time paſt, as well as the Time to come, and amounts to as much as if he had releaſed that Covenant; but the Covenant being broken, that Diſcharge ſhall not take away the Action on the Obligation, which was once forfeited, 3 *Leon.* 69.

Conſtruction.

Covenant upon a Leaſe for Years, made by the Plaintiff to the Defendant, of a Park, *&c.* for Five Years, if ſhe ſhould ſo long live; in which the Leſſee covenants for her, her Executors and Aſſigns, to keep the Premiſſes in good Reparation, and ſo to leave them at the End of the Term; and alſo to deliver to the Plaintiff (upon Notice given) Four Bucks and Four Does in Seaſon, during the Life of the Plaintiff, in every of the ſaid Years. And after the Expiration of the aforeſaid Term of Five Years, Plaintiff brought Covenant, and aſſigned the Breach, becauſe that in the End of the Term he had committed Waſte, and becauſe that after the End of the Term the Defendant refuſed to deliver the Deer. Now the Delivery of the Deer are during the Life of the Plaintiff, yet they are alſo every of the aforeſaid Years,

and therefore it was reſolved, that ſhe ſhall not have them during her Life, though it be *in fine Termini*, and not *ad finem Terminum*, yet it ſhall be intended a Breach of Covenant; Action well lies, *Pop.* 146. *Talbot* verſus *Sir Walter Lacer*.

In fine Termini, & ad finem Terminum.

In covenant to repair, Defendant pleads, That the Houſe was burnt by Caſualty; it's no Plea, *Stiles* 162. *Compton* and *Allen*. Leſſee covenants to repair a Park, and in the End of the Term to leave it ſufficiently repaired. Breach *quod non reparavit*, but in the End of the Term *fecit vaſtum*, (*viz.*) *in permittendo* the Pale to Decay, it's good, tho' the End of the Term is an Inſtant of Time in which a Thing cannot be ſaid properly to be done, yet it may be permitted, 2 *Rol. Rep.* 38.

Covenant, for that he let to *R. M. quoddam molendinum aquaticum in Paroch' de S. & omnia domus edificia aquas, aquarum curſus Ripas* [*Angl'* Dams] *dicto molendino adjacen' ſpectan' & pertinen'* for Twenty one Years, and he covenanted to repair the Houſes of the ſaid Mill, the Floodgates, *&c.* The Breach was aſſigned for not repairing of the Mill and Mill-banks, and for not leaving the Mill-ſtones; and Exception was taken, becauſe he ſhews not in what Vill the Mill-banks were, *ſed non Allocatur*, for they ſhall be intended to be in the ſame Vill where the Mill is. 2. Becauſe it was not ſhewn whether it were a Corn-Mill or a Fulling-Mill, *ſed not allocat'*, for all is one, the Breach being aſſigned for not repairing. It was alſo moved, that there were Three Breaches aſſigned, and the Defendant having demurred upon the whole Declaration, the Plaintiff ought to have Judgment for them, wherein the Breach was well aſſigned, and of that Opinion

Not repairing a Mill.

nion was all the Court, for they are as ſeveral Actions, *Crok. Jac.* 557. *Breſſey's* Caſe.

Covenant for not building of an Houſe; Defendant covenanted, that he would erect Three Houſes upon ſuch Land demiſed to him, unleſs he were reſtrained by the King's Proclamation. Defendant pleaded, ſuch a Day and Year the King made a Proclamation to reſtrain Building. Plaintiff demurs, becauſe a Proclamation was pleaded, and no Place expreſſed where the Proclamation was made, and ſo no Venue, if Iſſue ſhould be joined; alſo, becauſe it is not pleaded to have been *ſub magno Sigillo Angliæ*, for a Proclamation binds not, unleſs it be under the great Seal; and if it be denied, there can be no Iſſue thereupon, (but only *null tiell Record*) which cannot be, unleſs he pleads it to be *ſub magno Sigillo*, *Cr. Car.* 180. *Keily* and *Manning*.

Covenant to build, unleſs reſtrained by Proclamation.

Pleading Proclamation.

Covenant and declares upon a Leaſe made by the Queen to *George Baker*, and brought the Reverſion to himſelf by divers mean Conveyances, and brought the Term to the Defendant by a *que Eſtate* he had by divers mean Conveyances in general, *concurrentibus iis quæ in jure requiruntur*, and aſſigns divers Breaches in not repairing the Premiſſes. Defendant pleads, *non infregit Conventiones*. Plaintiff demurs, and Judgment for him. The pleading an Eſtate in a Term in either Perſon, under whom he does not claim, but is a Stranger, is good, for he is not privy to the Eſtate and Conveyances to a Stranger; but to plead an Eſtate in himſelf in a Term, or in any other under whom he claims, is not good.

Que Eſtate.

Non infregit Conventiones pleaded, when the Breach is in *non reparando*.

The Plea is too general. 1. Several Breaches being alledged. 2. Two Negatives cannot make a good Iſſue, and the Breaches in

non reparando, ideo non infregit, cannot be good, 3 *Lev.* 19. *Pitt* and *Ruſſell.*

Declaration in Covenant broken by Aſſignee againſt an Executor, for not repairing an Houſe and Utenſils contained in a Schedule; Aſſignee makes a Leaſe to the Teſtator, Schedule recited; Aſſignor dies ſeiſed; the Tenements deſcend to his Daughter, who married the Plaintiff.

Covenant to repair.

Et dict' R. J. *pro ſeipſo, Executoribus, Adminiſtrator' & Aſſignat' ſuis, & eorum quolibet, per Indenturam prædictam convenit & conceſſit ad & cum dicto* T. H. *Hæred', Executor', Adminiſtrator', & Aſſignat' ſuis, quod ipſe dict'* R. J. *Executor', Adminiſtrator', & Aſſignat' ſui, aliquis aut unus eorum de tempore in tempus, durante continuatione dictæ Dimiſſionis ad ejus & eorum ſive alicujus eorum propria Cuſtagia & Onera bene & ſufficien' repararent, manutenerent & cuſtodirent, dictum Domum, & dictam Wharfam, & omnia Fernacem Ciſternas & Vaſa,* [*Anglice, vocat'* Coolers,] *tunc exiſten' in & ſuper dicta Præmiſſa, & omnia alia, Ciſternas & Vaſa,* [*Anglice, vocat'* Coolers,] *quæ poſtea erect' eſſent infradict' Præmiſſa ſeu aliquam partem inde & res per Indentur' præd' dimiſſ' & mentionat' in Schedula indentat' dicte Indenture annex' & omnia palos fenſuras & inclauſur' dict' dimiſſ' præmiſſis pertin' in bon' & ſufficien' reparationibus & eadem præmis' ſic bene & ſufficien' repararat' manutent' & cuſtodit' in fine dicti Termini per dict' Indenturam conceſſ' forisfactur' ſive al' Determinatione dictæ Dimiſſionis reliquerent & ſurſum redderent dicto* T. H. *Hæred' ſive Aſſignat' ſuis. Et præd'* W. D. *in facto dicit quod præd'* R. J. *virtute Dimiſſ' præd' intravit,* &c.

Et

Et idem W. D. *ulterius in facto dicit quod poſt confectionem Indenturæ præd' & ante expirationem præd' Termini & durante continuatione dict' Dimiſſ'* (viz.) *primo Die Martii Anno Dom'* 1657. *Magna pars Domus præd' diſcooperta fuit pro def' Tegulationis,* [*Anglice,* Tiling,] *per quod Tigni* [*Anglice,* the Rafters,] *& trabes & maremium Domûs præd' putrid' ruinoſa & in magno decaſu devenerunt & maremium & ſubſtructiones,* [*Anglice,* Underpinnings,] *Domus præd' fract' fuer' & in magno decaſu pro defectu Reparationis & Emendationis & Aſſeres,* [*Anglice,* Boards,] *omnium camerarum Domus præd' dirupt' & putrid' fuer' & in magno decaſu devenerunt pro defectu Vitreationis,* [*Anglice,* Glazing,] *& Emendationis & Wharfa prædicta parcell' Dimiſſ' præmiſſ' pro defectu Aſſerum & Lignariorum* [*Anglice,* Planks and Piles,] *ruinoſa & in magno decaſu fuit, & reparatione & emendatione magnopere indigebat. Et pali & ſepes,* (viz.) *quadraginta perticat' palorum & octoginta perticat' ſepium præd' dimiſſ' præmiſſ' ſpectan' & pertinen' fract' & proſtrat' & in magno decaſu fuer' pro defectu Reparationis & Emendationis, & adtunc ſcil' Die & Anno ult' ſupradictis fornax præd' ac præd' Vaſa* [*Anglice,* Coolers,] *in Schedula præd' Indentur' præd' Annex' mentionat' adtunc & tempore confectione Indentur' præd' Domui præd' annexat' & parcell' liberi Tenementi ejuſdem Domûs exiſten' fract' & in magno decaſu fuer' pro defectu Reparationis & Emendationis. Et Ciſternæ & Canales,* [*Anglice,* Gutters,] *in eadem Schedula ſi liter mentionat' adtunc & tempore confectionis Indenture prædicte Domui præd' annexat' & parcell' libri Tenementi eiuſdem Domûs exiſten' fract' fuer' & in magno decaſu pro defectu Reparationis & Emendationis prædictoque* R. J. *omnia & ſingula Præmiſſa præd' ſic irre-* Breach aſſigned.

parat' & in decaſu in fine termini præd' eſſe permiſit contra formam & effectum Conventionis præd'. Et ſic idem W. *dicit quod nec præd'* R. J. *in vita ſua nec præfat'* T. H. *poſt ipſius* R. J. *mortem licet ſepius requiſit', &c. conventionem præd' de eo quod præd'* R. *pro ſeipſo,* and ſo recite the Covenant *ut ſupra,* to *Aſſignat' ſuis præfat'* W. D. *&* A. *Uxor ejus in Vita ejuſdam Annæ ſive eidem* W. D. *poſt ejuſdem Annæ mortem ſeu eorum alteri tenuerunt ſeu eorum alteri tenuit ſed infregeret & illi eadem* W. D. *tenere præd'* R. J. *in vita ſua & præd'* T. H. *poſt ipſius* R. J. *mortem omnino contradixerunt & præd'* T. H. *adhuc contradicit ad damn' ipſius* W. D. *&c. & inde, &c.*

Bar, *quod diſcooperturam meſſuagii quod fuit reparat' de tempore in tempus, & traverſe le Breach.*

Et modo ad hunc Diem ſcil' Diem Mercurii prox' poſt Octab. Sancti Hillarii iſto eodem Termino uſq; quem Diem præd' T. H. *habuit licentiam ad billam præd' interloquend' & tunc ad reſpond', &c. coram Dom' Rege apud Weſtm' vener' tam præd'.* W. D. *per Attornat' ſuum præd' quam præd'* T. H. *per* T. B. *Attorn' ſuum. Et idem* T. H. *Deff' vim & injur' quando & dicit.*

Traverſe.

Quod actio non quia quoad fraction' conventionis præd' in præd' diſcoopertura domi præd' pro defectu tegulationis inde in narratione præd' ſuperius in ea parte mentionat' idem T. H. *dicit quod Domus præd' de tempore in tempus & ad omnia tempora durante Termino præd' nec non ad finem ejuſdem Termini per præd' Indentur' ſuperius conceſſ' bene & ſufficienter reparat' manutent' & cuſtodit' fuit ſecundum formam & effectum Conventionis præd'* R. J. *in ea parte prædict' abſque hoc quod magna pars Domus prædict' diſcooperta fuit pro defectu tegulationis inde modo & forma prout præd'* W. D. *ſuperius verſus eundem* T. H. *inde narravit & hoc parratus eſt verificare, &c.*

Plea, *al auter part de Breach.*

Et quoad præd' fractionem Conventionis præd' in

præd'

præd muris & ſubſtructionibus præd' Domus pro defectu Reparationis & Emendationis inde in narration' præd' ſuperius in eâ parte mentionat' idem T. H. *dicit quod muri & ſubſtruction' Domus præd' de tempore in tempus & ad omnia tempora durante Termino præd' nec non ad finem ejuſdem Termini per Indentur' præd' ſuperius conceſſ' bene & ſufficien' reparat' manutent' & cuſtodit' fuer' ſecundum formam & effectum Conventionis præfat'* R. J. *in ea parte præd' abſq; hoc quod præd' muri & ſubſtructionis Domi præd' vel aliqua eorundem fuer' fract' & in magno decaſu pro defectu Reparationis & Emendationis inde modo & forma prout præd'* W. D. *ſuperius verſus eundem* T. H. *inde narravit & hoc paratus eſt verificare*, &c. (and ſo of Seven more Pleas to the Particulars,) *unde petit judicium pærcludi; non debet quia quoad præd' placitum præd'* T. H. *modo & forma præd' ſuperius in eâ parte placitat' quoad præd' diſcoopertur' Domus præd' pro defectu tegulationis inde in narratione præd' ſuperius in eâ parte mentionat'. Idem* W. D. *ut prius dicit quod magna pars Domus diſcooperta fuit pro defectu tegulationis inde modo & forma prout ipſe idem* W. D. *ſuperius inde narravit. Et hoc petit quod inquiratus per patriam & præd'* T. H. *inde ſi liter*, &c. And ſo the Plaintiff replies ſeveral to all the Pleas, and takes Iſſue upon the Traverſe.

Replic'.

Exitus.

Covenant for Reparation; where to be tried.

Declares of a Leaſe made in *Hampſhire*, of a Meſſuage in *Barkſhire*, and aſſigns a Breach for not repairing an Houſe. Defendant pleads, *Non infregit conventionem*, and Iſſue was tried in *Hampſhire*, where it is ſuppoſed the Covenant is made. Verdict *pro Quer'*. Moved in Arreſt, that it ought have been tried in *Barkſhire*, where the Houſe is, and the Repairs to be made, and ſo *per Cur'*, it ought to be. The Breach is in not repairing, and the Iſſue is *non infregit conventionem*: This ſhall be intended only in anſwer to the Breach, (*viz.*) That he had not broken the Covenant for want of Repairs, and ſo this is the only Matter triable, and only where the Houſe lies, 1 *Lev.* 114. *Gilbert* and *Martin*, 1 *Keb.* 575, 601. *meſme* Caſe, the Plaintiff has made his Breach Local in not repairing, and the Iſſue *non infregit conventionem*, refers ſpecially to that. This is a Special Iſſue, as well as if the Defendant had pleaded that the Houſe was in good Repair, *Ray.* 85. *meſme* Caſe, 1 *Sid.* 157.

Breach Local.

Non infregit conventionem.

Aſſignment and paying the Rent by the Aſſignee to the Plaintiff; the Reverſioner is no Plea, for the Aſſignee and his Executors are chargeable with the Breach of this Covenant, ſo that neither by the Aſſignment over of his Eſtate, nor by any Act he can do, can he diſcharge himſelf or his Executor having Aſſets, ſo long as the Leſſor continues the Reverſion in him; and tho' he aſſigns it over, his Aſſignee ſhall have it, for the Executors are not chargeable by Privity of Contract, but by the Covenant it ſelf; and by the ex-

preſs Words of the *Stat.* 32 *H.* 8. it being a Covenant *in Fait*, which runs with the Land. *Aliter*, of a Covenant in Law, or of a Rent which is created by Reaſon of the Contract, and it is by Reaſon of the Profits of the Land, wherein none is longer chargeable with them, than the Privity of the Eſtate continues with them, *Cr. Jac.* 521. *Brett* and *Cumberland*, *Cro. Car.* 58. and therefore in Covenant to repair within a Month after Warning. Defendant pleads, long Time before that Warning he aſſigned over to *J. S.* who had always after paid his Rent; and the Plaintiff accepted it, and avers Performance of all the Covenants till the Aſſignment. It's an ill Plea, for he may charge the Leſſee or Aſſignee at his Election, *Cr. Jac.* 309. *Bernard* and *Godſcall.*

Leaſe to Baron and Feme, and they covenanted to do no Waſte, or to repair Houſes. Baron dies, Feme ſurviveth and holds in; if the Wife commit Waſte, or not repair the Houſes, no Action lies againſt the Wife, for to ſuch a Leaſe the Wife is tied to pay the Rent, or to perform a Condition made by the Part of the Leſſor, but not to obſerve or perform Covenants of the Leſſee, 1 *Brownl.* 31.

Covenant to repair an Houſe; if Leſſee comes after the Term without Licence to repair it, he is a Treſpaſſor, 2 *Rol. Rep.* 250.

Leſſee for Years covenants at the End of the Term to leave and yeild up the Tenements well repaired to the Plaintiff; and the Breach was, that he had not left it ſo. Defendant pleads, that one *Blunt* was ſeiſed in Fee until by the Plaintiff diſſeiſed, who let to the Defendant; and after *Blunt* re-enter'd, who enfeoff'd *J. S.* who is yet ſeiſed, and

on

on Demurrer held a good Bar, *Cr. El.* 656. *Andrews* and *Needham*. This Caſe before.

The Breach was, That the Defendant did not repair. He pleads generally, *Quod reparavit*, this was held a good Iſſue after a Verdict, 2 *Mod.* 176. *Harman*'s Caſe.

CHAP. XIX.

Covenant that he had good Power and lawful Authority.

COUNT is, That *Bradſhaw*, by his Indenture dated, *&c.* demiſed to *John Salmond* divers Lands and Tenements in *S.* for the Term of Six Years, if *R. R.* Son of *N. R.* ſhould ſo long live, and covenants by the ſame Indenture with *Salmond*, that the ſaid *Bradſhaw* then had full Power and lawful Authority to demiſe the Premiſſes according to the Form and Effect of the ſame Indenture. *Salmond* for Breach of the ſaid Covenant in Fact, ſaith, that *Bradſhaw* at the Time of the making the ſaid Indenture had not full Power and lawful Authority to demiſe the Premiſſes according to the Form and Effect of the ſaid Indenture, *Et ſic præd' Robertus conventionem ſuam præd' cum eodem Johan in hâc parte non tenuit ſed illam penitus infregit.* *Bradſhaw* pleads Concord, *&c.* *Salmond* denies the Concord, and it was found for him. *Bradſhaw* brought a Writ of Error in the *Exchequer*-Chamber, and aſſigns Two Errors for the Inſufficiency of the Court. 1. That the Plaintiff had not averred that the ſaid *R. R.* was living at the Time of the Commence-

ment

ment of the Leaſe, nor at the Time of the Action brought, *Sed non allocatur*, for the Covenant refers to the Time of the Leaſe made, and then, be *R. R.* alive or dead the Action lies; for if he be dead before the Leaſe, then the Leaſe is abſolute; and if he dies after the Leaſe, and before the Action brought, yet the Action lies, and Conſideration thereof ſhall be had in Damages. 2. That *Salmond* in his Count had not ſhewed what Perſon had Eſtate, Right, Title, or Intereſt in the Lands demiſed at the Time of the making the Indenture, by which it may appear to the Court, that *Bradſhaw* had not full Power, *&c.* But *per Cur'*, the Aſſign- Breach.
ment of the Breach is good, for he had perſued the Words of the Covenant Negative, and it lies more properly in the Notice of the Leſſor what Eſtate he had in the Land, than the Leſſee who is a Stranger to it; and therefore the Defendant ought to ſhew what Eſtate he had in the Land at the Time of the Demiſe made, by which it may appear to the Court that he had full Power and lawful Authority, *&c.* 9 *Rep.* 60. *b. Robert Bradſhaw's* Caſe, *Cr. Jac.* 304. *meſme* Caſe, 1 *Cro.* 176. otherwiſe in Debt upon an Obligation with Condition to perform Covenants, *Cro. Car. ibid.*

CHAP.

CHAP. XX.

Covenants for quiet Enjoyment. Pleadings. Eviction or Diſturbance how to be pleaded; or what amounts to a Breach of the Covenant, in reſpect of the Word Conſtruction.

Vid. 1 Keb. 937.

Eviction or Diſturbance, how to be pleaded.

THERE is a Diverſity between a Covenant in Law and an expreſs Covenant. The Defendant leaſed to the Plaintiff an Houſe by the Words, [*Demiſe* and *Grant*,] which Words import a Covenant in Law; and the Leſſor covenanted, that the Leſſee ſhall enjoy the Houſe during the Term, without Eviction by the Leſſor, or any claiming under him, (which expreſs Covenant was narrower than the other) and gave Bond to perform Covenants. The Plaintiff grants this Term over to a Stranger. The Plaintiff aſſigned for Breach, that one *S.* entered upon the Aſſignee, and in Ejectment recovered againſt the Aſſignee. Debt was brought. *Per Cur'*, by this Covenant in Law the Aſſignee ſhall have a Writ of Covenant, and for this Breach of the Covenant in Law the Obligation was forfeited. But becauſe the Plaintiff did not ſhew that *S.* had an *Eigne Title*, (for otherwiſe the Covenant in Law was not broken) therefore Judgment againſt the Plaintiff, 4 *Rep.* 80. *b. Nokes's* Caſe, *Cr. El.* 674. *meſme* Caſe. And,

By Breach of Covenant in Law the Obligation is forfeited.

Eigne Title.

Regularly no Covenant lies upon the Word, [*Demiſi*,] unleſs in Caſe of Eviction of Leſſee, and actual Ouſter or Expulſion by the Leſſor or a Stranger. *D.* was

D. was bound to *H.* upon Condition that *H.* and his Heirs might enjoy certain Copyhold Lands ſurrendered to him; the Defendant pleads the Surrender, and that the Plaintiff entered, and might have enjoyed the Lands. Plaintiff replies, that after his Entry one *E.* entered upon him and ouſted him. *Per Cur'*, the Replication is ill, becauſe he did not ſhew he was evicted out of the Land by lawful Title, for elſe he had his Remedy againſt the wrong Doer, *Vaughan* 121, 122. *Hammond's* Caſe.

Shew Eviction by lawful Title, and why.

The Condition was, that he ſhould enjoy ſuch Lands without Eviction: The Breach was aſſigned in the Recovery by Verdict in Ejectment, upon a Leaſe made by one *Eſſex*, and ſhews not what Title *Eſſex* had to make the Leaſe, but avers that *Eſſex* had good Title, and it might be he had Title derived from the Plaintiff after the Obligation made, and therefore he ought to ſhew that he had good and eigne Title before the Leaſe made; and in the *Exchequer*-Chamber the Replication was held ill, *Cr. Jac.* 315. *Kirby* and *Hanſaker*, 2 *Sand. Hele* and *Wotton*, 177, 178. 1 *Lev.* 301. 2 *Lev.* 37. *Moo.* 861. *Hob.* 34. Tho' this was after a Verdict.

He muſt ſhew not only that he had good Title, but eigne Title; and why.

Covenant and declares, that the Defendant let to him ſuch Land, and covenanted to ſave him harmleſs againſt all *Suits*, *Evictions*, or *Expulſions*. Defendant pleads, *J. S.* ouſted him by an *hab' fac' poſſeſſion'*. Plaintiff demurs: The Plea is ill, for Two Cauſes; 1. Becauſe he pleads Expulſion by an Execution, without ſhewing any Judgment: He ought to have ſaid, that *J. S.* brought Ejectment, upon which *taliter proceſſum fuit quod conſideratum fuit*, that he ſhall recover; and upon this

Expulſion by Execution pleaded.

this ſued an *hab' fac' poſſeſſion'*. 2. He ought to have ſhewed that *J. S.* had legal Title before the Leaſe, upon which he brought the Action; for the Covenant doth not extend but to Expulſions upon *eigne Droit*, and perhaps in this Caſe *J. S.* might recover by Vertue of a Leaſe made to him by the Plaintiff himſelf, 1 *Lev.* 83. *Nicholas* and *Pullin*, 2 *Keb.* 379.

Covenant extends to Expulſion upon eigne Title.

One covenants with *J. S.* that he ſhall enjoy the Land; and farther, that *A.* a Farmer of the Tythes, ſhall pay 8 *l. per Annum*, and is bound to Performance. In Debt on the Bond, it is good to plead Performance of the Covenants, *ex parte ſua per implend'*, for this implies the Farmer had paid the 8 *l.* and expreſs Mention of that need not to be, *Dyer* 23 *El.* 372, 373.

Plead he had performed the Covenants *ex parte ſua per implend'*.

Plaintiff declares, that Sir *John Swinnerton* let to him, *&c.* and covenants, that the Plaintiff ſhould quietly enjoy it during the Term, without the Let or Diſturbance of him, his Heirs or Aſſigns, or of any other Perſon by or through his *Means*, *Title* or *Procurement*; and ſhews for Breach, that the Lord *Peters* by Fine granted the Land to Sir *John Swinnerton* and his Wife (the Defendant), and to the Heirs of Sir *John*, and that this Fine was ſo levied *by the means of Sir John*, and that after he made the Leaſe to the Plaintiff, Sir *John* died; his Wife enters, who was Excutrix. *Per Cur'*, the Action lies; tho' ſhe claims by Title derived from another, yet ſhe claims by *his Means*, *Cr. Jac.* 657. 2 *Rol. Rep.* 286. *Butler* verſus *Lady Swinnerton*.

Quietly to enjoy without Diſturbance of him, *&c.* or any other Perſon by or through his *Means*, *Title* or *Procurement*.

For tho' in Point of Eſtate the Wife was in by the Lord *Peters*, yet this was by Means of the Purchaſe and Procurement of her Husband, for this was procured to make her

a Jointure. And if he make a Leaſe, and Leſſee grants it over, and after he makes a ſecond Leaſe with ſuch Words; if this Leſſee be ejected by the Aſſignee of the firſt Leſſee, it is a Breach of the Covenant, becauſe this is by Means of the Covenantor, altho' not *his Act*: And this Covenant provides as well againſt lawful Entries by *his Means* and *Procurement*, as againſt tortious; and this Word [*Title*,] does not refer to Diſturbance, but to Eſtate. Tenant in Tail makes a Leaſe, and covenants that the Leſſee ſhall enjoy againſt him and all claiming under him; if he dies, and his Iſſue ouſts the Leſſee, the Covenant is broken: For tho' he is in *pro formam Doni*, yet it is by Deſcent from the Father, and ſo by *his Means*, tho' not *his Title*. But if the Iſſue make ſuch a Leaſe and Covenant, and the Iſſue of the Iſſue enter, it is not broken, becauſe he is not in by *his Means*, but by *diſcent*, which is by Act in Law *& per formam Doni*, *Palmer* 339, 340. The Lady *Swinnerton*'s Caſe.

Where the Words extend againſt lawful Entries as tortious Entries.

[*Title*,] to what it refers.

Aſſignee brings Covenant againſt the Aſſignor for being diſturbed in Non-enjoyment quietly. Defendant pleads 40 *l.* accepted of him in Diſcharge of the Wrong: After, Aſſignee brings Covenant againſt the Executor of the Leſſor, who pleads this Acceptance: It's no Plea. Had he pleaded the Acceptance of the 40 *l.* in Satisfaction of the Covenant, it might have been good, *Stiles* 300. *Whitway* and *Pinſent*.

40 *l.* accepted in Satisfaction pleaded.

Leſſor, Tenant for Life, lets for Twenty one Years, and covenants that he had not done any Act to prejudice the ſaid Leaſe, but that he ſhould enjoy it againſt all Perſons. Tenant for Life dies, the Leſſor in Reverſion enters:

enters: Leſſee ſues the Executors. The Action lies not, for the laſt Words refer to the firſt Words, [*for any Thing done by him,*] *Cr. Eliz.* 615. *Garvis* and *Pead.*

[*For any Thing done by them*] how extends.

If Tenant for Life makes a Leaſe for Twenty Years, and covenants that the Defendant ſhall enjoy it during the Term, that ſhall be conſtrued during his Life, for the Term endeth by his Death. *Aliter*, if the Covenant had been during the Term of Twenty Years, 1 *Brownl.* 22. *Brag* and *Wiſeman.*

Diverſity between [during the Term] and [during the Term of ſo many Years.]

Covenant was, that the Leſſee and his Aſſignees ſhould enjoy it, without the Let or Interruption of *F. E.* and all others claiming under the ſaid *F. E.* The Breach aſſigned was, becauſe he was ouſted by *J. S.* who claims under the Title of *F. E.* and does not ſhew how he claims under his Intereſt, nor by what Conveyance: It's ill, tho' he be a Stranger, *Cr. El.* 823. *White* and *Ewer.*

What Suits amount to a Breach of Covenant for quiet Enjoyment; Vid. *Breach as to Suits.*

Vaughan 118. in *Bickerſtaff* and *Hays's* Caſe, is very plain what the Law is.

All Covenants between the Leſſor and the Leſſee are Covenants in Law, or Expreſs. By Covenant in Law, the Leſſee is to enjoy his Leaſe againſt the lawful Entry, Eviction or Interruption of any Man, but not againſt tortious Entries, Evictions or Interruptions; and the Reaſon of the Law is clear and ſolid, becauſe againſt tortious Acts the Leſſee hath proper Remedy againſt the wrong Doers; by the ſame Reaſon, if the Leſſee be by expreſs Covenant to enjoy the Term, (or to enjoy it againſt all Men, which is the ſame) he ſhall not have Action of Covenant againſt the

the Leſſor, unleſs he be legally ouſted or evicted; for if he is ouſted tortiouſly by any Stranger, he hath legal Remedy; but if the Leſſor expreſly covenants that the Leſſee ſhall enjoy his Term without the Entry or Interruption of any, whether ſuch Entry and Interruption be lawful or tortious, there the Leſſor ſhall be charged by Action of Covenant for the tortious Entry of a Stranger, becauſe no other Meaning can be given of the Covenant.

Elias Tiſdale brought Covenant againſt Sir *William Eſſex*, and declared, that Sir *William convenit permiſit & agreeavit ad & cum prad' Elia, quod ipſe idem Elias, hæret' occuparet & gauderet*, certain Lands for Seven Years, into which he entered, and one *Elſing* had ejected him, and kept him out ever ſince. Reſolved, becauſe no Title is laid in *Elſing*, he ſhall be taken to enter tortiouſly, and the Leſſee hath his Remedy againſt him: Therefore Judgment was for the Defendant *Eſſex*.

So that neither upon Covenant, Aſſumpſit, or Action of Debt on Bond for quiet Enjoyment, unleſs the Breach be aſſigned for a lawful Entry and Eviction, an Action of Covenant cannot be maintained.

If Leſſor covenants againſt himſelf, his Executors, Adminiſtrators and Aſſigns, the Leſſor is not to be charged with the tortious Acts of his Aſſignee.

If a Man covenants for Enjoyment againſt a particular Perſon or Perſons, he covenants as well againſt their tortious Entries as legal, *Hob. p.* 34, 35. *Vaughan* 118. *Cr. El.* 212, 213. 1 *Rol. Rep.* 397. *Moo.* 867.

The Covenant was, That the Covenantee ſhould peaceably enjoy an Acre of Copy-hold Land, according to the Cuſtom of the Mannor. The Defendant pleads, by Cuſtom of the Mannor the Covenantee ought to pay to the Lord a Rent, and for Non-payment the Lord to re-enter; and that the Covenantee did not pay it, and the Lord entered and demanded Judgment *ſi Actio*: A good Plea. *Bendl. p.* 32.

Covenant to ſave harmleſs from lawful Eviction.

A Covenant was to ſave harmleſs from lawful Eviction; Defendant pleads Performance. Plaintiff replies, that *J. S.* took out a Writ of *Hab. fac' poſſeſſion' in B. R. Debito modo exeun'*, and by Vertue thereof expelled him. *Per Cur'*, *Debito modo* is not ſufficient, without ſhewing Particulars; he ought at leaſt to recite the Term of the Judgment, but not the Title of him that evicted, 1 *Keb.* 379. *Nicholas* and *Pullen*, and 1 *Lev.* 83.

Debito modo exeun'.

A Condition peaceably to enjoy from the 1 *Febr. uſque Michaelmas*-Day, Tythes, paying half yearly during the Term, and on Default of Payment, the Defendant (Leſſor) to be free from all Obligation to the Plaintiff. He replies, and aſſigns a Breach in Non-payment of Rent at *Michaelmas*, which is after the Term ended: And Defendant demurs. Now the Subſtance of the Suit is, quiet Enjoyment, and therefore ought not to be taken by Proteſtation. *Sed per Cur'*, Enjoyment need not be anſwered where it's defeaſanced by Payment of Rent, yet Judgment *pro* Defendant, 3 *Keb.* 550, 594. *Biggin* and *Bridg.*

Where Enjoyment need not be anſwered.

A Con-

A Condition to perform Covenants in a Leaſe; one was, that he ſhould enjoy ſuch Lands let to him quietly, without Interruption. And the Plaintiff in his Replication ſheweth *in facto*, that the Defendant 20 *March*, 30 *El.* had diſturbed him, and in that aſſigned the Breach. The Defendant by Rejoinder ſheweth, that in the Indenture there was a Proviſo, that if he paid 10 *l.* the 31 *March*, 30 *El.* that the Indenture and all therein contained ſhould be void, and alledged he paid 10 *l.* at the Day (but this was after the Diſturbance ſuppoſed). Plaintiff demurs: Judgment *pro Quer'*. For by the Covenant broken before the Condition performed, the Obligation was forfeited; and it is not material that the Covenant became void before the Action brought; but by *Wray*, if the Proviſo had been, that upon the Payment of the 10 *l.* that then as well the Obligation as the Indenture ſhould be void: *Aliter*, for then the Bond was void before the Action brought, *Cr. El.* 244. *Hill* and *Pilkington*.

By Covenant broken before the Condition performed, Obligation is forfeited.

Tenant in Tail, Reverſion to the Queen in Fee, lets it for 21 Years by Indenture, and covenants that the Leſſee ſhall enjoy it againſt all Perſons, without the Interruption of any beſides the Queen, her Heirs and Succeſſors; the Queen grants her Reverſion to *W.* Tenant in Tail dies without Iſſue. *W.* enter: Leſſee brought Covenant. It lies, for the Queen's Patentee is not excepted, *Cr. El.* 517. *Woodraſt* and *Greenwood*.

There was a Covenant in an Aſſignment of a Leaſe, that the Aſſignee ſhould quietly enjoy, *&c.* free and clear of and from all Arrears of Rent: An Action was brought upon

this Covenant, and the Breach assigned was, that the Rent was Arrear and not paid. The Defendant pleaded, he left so much Money in the Hands of the Plaintiff, *ad intentionem*, to pay it to the Lessor in discharge of what Rent was then in Arrear: And upon Demurrer the Plea was held good, notwithstanding the Objection that the Intention was put in Issue; for if it had been *ad solvend'*, it had been good, and in this Case the Plaintiff might have replied, *non reliquit*, &c. *in Manibus suis ad solvend'*, 4 *Mod.* 249. *Griffith* and *Harrison*.

Covenant to save harmless from Eviction, in a Lease dated long before the Delivery, shall extend to Eviction before the Delivery.

Covenant was brought upon Indenture of Lease for Nine Years, dated 1 *Jun.* 16 *Car.* 2. which was to save the Plaintiff harmless of all Evictions during the Term, and the Breach assigned was Eviction, 26 *June*, 16 *Car.* 2. Defendant pleads, that the said Deed was *primo deliberat'*, 1 *July*, 17 *Car.* 2. which was after the Breach assigned; and pleads further, that the Plaintiff was not ejected after the Delivery of the Deed: Upon which the Plaintiff demurs. *Et per Cur'*, these Words, [during the Term,] shall be continued during the Term in Computation, and not only from the Time of the Delivery of the Deed, when it commenceth in Point of Interest; and so Judgment was given for the Plaintiff, *Sid.* 374. *Lewis* and *Hillard*, *Cr. Jac.* 263. *Offley* versus Sir *Bapt. Hicks*.

If the Lessor covenants with his Lessee, that he hath not done any Act to prejudice the Lease, but that the Lessee shall enjoy it against all Persons: These Words, [against all Persons,] shall refer to the First, and be limitted and restrained to any Acts done by him, and no Breach shall be allowed but on such an Act,

Act, *Jarvis* and *Pead*, *Mic.* 40 & 41 *Eliz. B. R.* 5 *Rep.* 17. &c. 22 *H.* 6. 52. *Dier* 257.

Not to be interrupted in his Poſſeſſion, and by one in particular.

Debt on Bond to perform Covenants; one of which was, That the Plaintiff ſhould not be interrupted in his Poſſeſſion of certain Lands by any Perſon that had lawful Title, and particularly, that he ſhould not be interrupted by one *Thomas Antony*, by vertue of any ſuch Title. Defendant pleads Performance. Plaintiff replies, 1 *Nov.* 20 *Car.* the Defendant made the Leaſe to the Plaintiff, and 3 *Nov.* he entered; and that 17 *Aug.* 20 *Car.* before the Defendant made a Leaſe to *Antony* for Years yet to come, who 20 *Aug.* 20 *Car.* entered. The Defendant pleads, the Leaſe to *Antony* was on Condition of re-entry for Non-payment of Rent, and that before the Leaſe made to the Plaintiff the Rent was behind, and *Legitimè demandat' ſecundum formam Indentura*; and he re-entered and made the Leaſe to the Plaintiff upon general Demurrer. *Per Cur'*, the Demand was not ſufficiently alledged, for he ought to ſet forth when and where it was made, that the Court might know if it were Legal. But for a Flaw in the Plaintiff's Replication, becauſe he alledged his Entry after the Leaſe made to *Antony*, ſo that it appears not he was interrupted by him, the Opinion of the Court was againſt the Plaintiff, *Allen p.* 19. *Coleman* and *Painter*.

Re-entry for Rent *Legitimo modo demandat'*.

Johnſon and *Vavaſor*, Joint-Tenants of a Mill by Leaſe for Years; *Vavaſor* aſſigns all his Intereſt in the Mill to another, without *Johnſon*'s Aſſent or Privity, and dies. *Johnſon* after recited this Indenture by Leaſe, and that all came to him by Survivorſhip, grants the Mill, and all his Eſtate, Title and Intereſt, to

Covenant for quiet Enjoyment, notwithſtanding any Act done by him.

Proctor, and covenants that he ſhall quietly enjoy it, notwithſtanding any Act done by him, and Bond for Performance of Covenants. In Action of Debt on the Bond, *Johnſon* pleads, that the Plaintiff had enjoyed it, notwithſtanding any Act done by him. *Proctor* replied, that *Vavaſor*, Joint-Tenant with *Johnſon*, aſſigned his Eſtate to *J. D.* who entered and expelled him. The Defendant demurs: And adjudged againſt the Defendant; for the Grant was never good, for he had no Power to grant one Moiety, and yet he had expreſly granted the Mill to *Procter*; and the Condition of the Obligation being to perform all Grants, the Grant being defective at the firſt as to a Moiety, which is the Subſtance of the Agreement of all the Parties. This is not qualified by the Covenant enſuing, and it is not like to *Nokes*'s Caſe, 4 *Rep.* for there the Grant was good for the whole, and becomes ill by Eviction afterwards, and therefore in that Caſe the Covenant enſuing qualified the general Covenant, *Yel. p.* 175. *Litt.* 206. 1 *Bulſt.* 3, 4. *Procter* and *Johnſon*, 2 *Cro.* 233.

Condition to perform all Grants.

If one covenants to enter into Bond for the quiet enjoying of Land, and doth not ſay what Bond, in this Caſe it ſhall be taken to a Bond of ſo much as the Land to be enjoyed is worth, 5 *Rep.* 78. *a.*

In Debt on Bond to ſave harmleſs from lawful Evictions; Dower being recovered after Bar by Fine and Non-Claim, without Exception to it, which might have been taken; it was held no lawful Eviction, and ſo the Defendant found not guilty, for the Plaintiff muſt ſufficiently intitle himſelf, *Allen* and *Thorn* cited, 1 *Keb.* 379.

Conuſee

Conuſee of a Statute extends and aſſigns it to one, and after grants the Land to another, and covenants, that notwithſtanding any Act by him, or any other by his Conſent, that the Statute Extent and Execution ſhall be in force, and in Covenant brought by *R.* This Aſſignment was aſſigned for Breach, and upon Demurrer, adjudged *pro Quer'*. And now in Writ of Error this Judgment was reverſed, for notwithſtanding the Aſſignment, the Statute is in force; but if the Plaintiff *eo quod conceſſit* to him, which implies a Covenant, the Action had been maintainable: But the Breach is aſſigned in the Covenant only, which is not broken by the Aſſignment, for the Statute is in force after the Aſſignment, ſo that the Conuſee may releaſe, 17 *Ed.* 3. and the Aſſignment proves the Statute to be in force; but if he had covenanted, that the Grantee ſhall enjoy without Diſturbance, the Aſſignment had been a Breach of the Covenant; and ſo is a Breach of Covenant in Law implied in the Word [*Grant,*] if the Action had been brought upon it, *Palm.* 388. *Perſon's* Caſe. [*Grant.*]

What amounts to Eviction, Interruption, or Diſturbance, or not, in reſpect of Words and Conſtruction. Vid. ſub Titulo, *Breach by Suits.*

The Words, aſſign, ſet over, and transfer, [*vendidit, aſſignavit & tranſtulit,*] do not amount to a Covenant againſt an Eigne Title, yet againſt the Covenantor himſelf it will amount to a Covenant; as a Covenant againſt all claiming by, from, or under me; *per Hales,* 3 *Keb.* 304. As for the Word, [*Demiſi,*] *Vid. ſupra.* The Words, [*vendidit, aſſignavit, & tranſtulit.*]

That he forbad his Tenant to pay Rent assigned for a Breach.

Debt on Bond to perform Covenants; the Covenant was for quiet Enjoyment, without Let, Trouble, or Interruption, *&c.* The Plaintiff assigned his Breach, that he forbad his Tenant to pay his Rent. *Per Cur'*, it's no Breach, unless there were some other Act, 1 *Brownl.* 81. *Whichcott* and *Lineſey* versus *Nine.*

How far the Word [*defend*] extends.

The Condition was, If the Defendant *warrant* and *defend* an Oxgang of Land to the Plaintiff, against *J. S.* and all others, that then, *&c.* Resolved that the Word [*defend,*] shall be taken as a Defence against lawful Titles, and not against Trespasses, *More* N°. 294. *Crocock* and *White.*

The Servant by Command enters and cuts down Trees.

The Covenant was to enjoy peaceably against *M.* Breach was assigned, that *M.* had entered and cut down Five Elmes; upon Evidence it was, *A.* Servant of *M.* by Commandment, and in the Presence of his Master, had entered and cut, and good, 1 *Leon.* 157. *Seaman* and *Browning.*

Lessor himself ousts the Lessee.

Debt on Obligation for Performance of Covenants; the Breach assigned was, The Defendant, Lessor, covenanted that it should be lawful for the Plaintiff, being Lessee, quietly to enjoy the Land, and that the Lessor himself ousted him; this illegal Ouster was a Breach of the Covenant, *Cr. El.* 544 *Corn's* Case.

[*Suffer,*] how far it extends.

The Condition was, That he shall suffer his Lessee for Years to enjoy, *&c.* and that without the Trouble of him or any other Person, a Stranger enters by *Eigne Title.* The Condition is not broken, for this Word, [*Suffer,*] is a Passive, and all the rest is to be referred to it; but if any Procurement or Occasion of Disturbance be by the Lessor, his Executors or Assigns, then he forfeits the Obligation, 2 *Ed.* 4. 2 *b.* 1 *Rol. Abr.* 425.

Debt to perform Covenants in a Leaſe; one was for quiet Enjoyment againſt all claiming Title. The Plaintiff aſſigns for Breach, that a Stranger entered, but ſaith not *habens Titulum*: *Hales*, *habens Titulum* at that Time would have done. *Dier*'s Caſe is, another entered claiming an Intereſt, but that is not enough, for he may claim under the Leſſee himſelf. If the Covenant had been to ſave him harmleſs againſt all lawful and unlawful Titles, yet it muſt appear that he that entered did not claim under the Leſſee himſelf, 1 *Mod.* 101. 3 *Keb.* 246. *Norman* and *Foſter*, *Hob.* 34. *Tiſdale* and *Eſſex*, *Moor* 861.

Claiming Title, a Stranger enters, and it is not ſaid *habens Titulum.*

Covenant was; Whereas the Plaintiff was in Poſſeſſion of ſuch Lands, that neither *J. S.* nor *J. D.* nor *J. G.* ſhould diſturb him by any indirect Means, but by due Courſe of Law. Defendant pleads, that *nec* J. S. *nec* J. D. *nec* J. E. did diſturb by any indirect Means, but by due Courſe of Law: It's not good, but a *Negative Pregnant.* If he had pleaded he was not diſturbed by any indirect Means, it had been good. If he had ſaid, that he had not been diſturbed *contra formam conventionis præd'*, *Godb.* 60. *Dighton* and *Clark*, 2 *Leon.* 197.

Covenant againſt Diſturbance by Three Perſons named.

One covenants, that he ſhall enjoy againſt him and *Vaulore*, and all claiming under him, and aſſigns a Breach that *Cook* claims under *Vaulore*, and ejected him. Defendant pleads, that at the Time of the Covenant he was ſeiſed of an Indefeaſible Title, and that by an Act of Parliament made after reciting that *Vaulore* had ſettled this Eſtate in Lady *Mary Powell*, and that certain Perſons had unduly procured a Fine of her; it enacts, that the Fine ſhall be void, and that any Perſon might enter as if no Fine had been levied; and

Covenant againſt *Vaulore*, and all claiming under him: One claims under him by Act of Parliament made after the Covenant.

and that by Vertue of this Fine, *& non aliter*, the Defendant was ſeiſed, and ſold and made the Covenant. And that after the Act *Croke* claiming by Title under the ſaid Lady *Powell* by *Vaulore's* Settlement, by Vertue of the ſaid Act of Parliament entered and ouſted him. Plaintiff demurs, for that the Title being good at the Time of the Covenant made, and the Title upon which the *Ouſter*, it being by Act of Parliament, it's no Breach, as 9 *Rep.* 106. *Dame Greſham's* Caſe: But *per Hales* and *Rainsford*, this Act doth not make a new Title, but removes an Obſtruction from the old, and doubtleſs *Vaulore* was named in the Covenant for this Purpoſe, in caſe this Fine unduly obtained ſhould be avoided. *Twiſden contra.* Q. 2 *Lev.* 26. *Lucy* and *Levington*, 1 *Ventr.* 175. and 2 *Keeble* 831. *meſme* Caſe.

Leſſee for Twenty one Years rendring Rent, with a Condition to re-enter, *&c.* Leſſee leaſeth Parcel to the Plaintiff for a leſs Term, and under a leſs Rent, with this Special Covenant, That the Plaintiff ſhould enjoy without Impeachment of him or any other occaſioned by his Impediment, Interruption, Means, Procurement, or Conſent. Defendant paid not the Rent, and his Leſſor enters into the whole, and avoided the Plaintiff's Term. *Per Cur'*, it's a Breach, 1 *Bulſt.* 182. *Stevenſon* and *Powell.*

The Plaintiff by Deed indented leaſed to the Defendant a Farm called *D.* except one Cloſe by Name. Leſſee (Defendant) was bound in a Bond to perform all the Covenants and Agreements in the ſaid Indenture, and pleaded he had performed all the Covenants. The Plaintiff aſſigns for Breach, that the

the Defendant entered into the Cloſe excepted. Defendant demurs. The Obligation is not forfeited by this Diſturbance, for the Land excepted is not named. This Exception is not ſuch an Agreement as is within the Intent of the Condition, it's an Agreement that the Land excepted ſhall not paſs by the Demiſe, but no Agreement that he ſhall occupy; but in ſome Caſes, an Exception is an Agreement that ſhall charge the Leſſee, but this is when he agrees on his Part, that the Leſſor ſhall have a Thing *dehors*, which he had not before, as except a Way or Common, or any other Profit Apprender, that is, an Agreement of the Leſſee that he ſhall have the Profit; and if he be bound to perform all Covenants and Agreements, if he diſturbs him in this, he ſhall forfeit his Bond, *Cr. El.* 657. *Lady Ruſſel* verſus *Gullwell*, *More* 553. *meſme* Caſe, 1 *Rol. Abr.* 43. Vide *Plo.* 67. in *Dure* and *Manningham's* Caſe.

Diſturbance in Land excepted, no Breach. Agreement.

Where an Exception is an Agreement.

Two make a Leaſe for Years by Indenture, and covenant that the Leſſee ſhall not be diſturbed, nor by any Incumbrance made by them: One of the Leſſors makes a Leaſe to a Stranger, who diſturbs, on Bond to perform Covenants; it is a Breach of the Condition, for [*them*] ſhall not be taken jointly, *Latch.* 161. *Meriton's* Caſe, *Pop.* 200. *Noy.* 86. *meſme* Caſe.

[*Them*] where not to be taken jointly.

A Covenant that the Leſſee ſhall enjoy enjoy againſt the Leſſor, and all claiming under him. The Defendant exhibited a Bill, whereby the Leſſor appeared to be in Truſt, and adjudged this was no Breach. *Selby* and *Chute* cited, 2 *Keb.* 288. 2 *Brownl.* 23. *Moo.* 859, *Ciſt' Caſe* deny *pur Ley*, *Raym.* 371.

Exibiting a Bill, no Breach.

To

To enjoy *absq; legali Impedimento* of *J. S.* The Breach is, that *J. S. habens jus* entered: It is a ſufficient Breach, 2 *Keb.* 878. *Procter* verſus *Newton. Per Hales, habens jus* implies it a lawful Eviction, 2 *Lev.* 37. & 1 *Ventr.* 184. *meſme* Caſe.

To enjoy absq; legali Impedimento. Habens jus.

Covenant; is Whereas he had let to the Plaintiff the Parſonage of *B.* that he would ſave him harmleſs concerning it againſt *M. B.* and he alledgeth *M. B.* entered upon him and put him out, and ſaith not the Entry of *M. B.* was lawful. *Per Cur'*, when the Covenant is to ſave him harmleſs againſt a Perſon certain, he ought to defend him againſt the Entry of that Perſon, be it by Right or Wrong. *Aliter*, if againſt all Perſons, for there it ſhall be taken for a lawful Entry or Eviction. Had it been to have warranted againſt him, it muſt have been a lawful Title, ſo that in this Caſe to ſave harmleſs is more than to warrant, *Crok. El.* 213. *Foſter* and *Mapes*, 1 *Leon.* 324. *meſme* Caſe.

When the Covenant is to ſave harmleſs againſt a Perſon certain, he ought to defend him againſt the Entry of that Perſon, be it by Right or Wrong.

In Debt on Bond againſt Baron and Feme being made in her Widowhood, with Condition that ſhe, her Heirs and Aſſigns, keep Contracts and Covenants made between her former Husband and his Leſſee the Plaintiff; and there was an Agreement that the Plaintiff ſhould enjoy a Warren of the Demiſe of the former Husband, and that he entered till put out by the Defendant: Iſſue on the Agreement, and found for the Plaintiff. It was moved in Arreſt of Judgment, that there was no Eſtate alledged in her former Husband *in jure Uxoris*, whereby tho' the ſecond Husband be Aſſignee in Law, yet he enters of his own Wrong, and not as claiming under her. But *per Windham*, it's not requiſite

that

that the Husband be Aſſignee of the Eſtate, but her Aſſignee of Covenant, 1 *Keb.* 348, 512. *Hall* verſus *Creſwell* and his Wife. Judgment *pro Quer'*. Aſſignee of the Eſtate, Aſſignee of the Covenant.

In a Leaſe for Years, the Defendant covenants that the Plaintiff ſhall enjoy it during the Term; on Demurrer the Caſe was, Tenant for Life levies a Fine to him in Reverſion *come ceo, &c.* the Uſes were to the Coniſee and his Heirs, on Condition to pay to the Tenant for Life 4 *l. per Annum* during his Life, and upon Default, that it ſhould be to the Uſe of the Coniſor for her Life; the Coniſee made a Feoffment to the Defendant, who leaſed to the Plaintiff; the 4 *l.* was not paid nor demanded, the Tenant *pro* Life enters upon the Plaintiff. This is a Breach of the Condition without any Demand of the Rent, for it is a Sum in Groſs, and not iſſuing out of the Land. The Covenant is, that the Leſſee ſhall abſolutely enjoy it, and it was held that this Feoffment hath not deſtroyed the future Uſe, which is to ariſe for Non-performance of the Condition, *Cr. El.* 688. *Smith* and *Warren*. Sum in Groſs, and not a Rent.

CHAP.

CHAP. XXI.

Covenant for quiet Enjoyment.

IF Leſſee for Years aſſign to *J. S.* and after aſſigns it to *J. D.* and covenants with *J. D.* that he is poſſeſs'd of the Term, and that *J. D.* ſhall enjoy it, and ſhall be ſaved harmleſs from all Incumbrances done by him; the firſt Aſſignment is not any Breach of the Covenant before Entry made by *J. S.* nor any Diſturbance of the Poſſeſſion. 1 *Rol. Abr.* 430. *Lamb* and Sir *Lewis Treſham.*

Prior Aſſignment no Breach till Entry.

If Leſſor covenants with his Leſſee for Years, That it ſhall be lawful for the Leſſee, *&c.* peaceably to enjoy the Land, and after the Leſſor enters tortiouſly upon the Leſſee, and ouſts him; this is a Breach of the Covenant, for the Intent of it was, That he ſhould enjoy it without the Interruption of the Leſſor: So it had been if the Word [*Peaceably*] had not been in the Covenant. *Hob.* 49. But if Covenant be in a Leaſe *per* Indenture, That *B.* ſhall enjoy the Land peaceably and quietly to his own Uſe, according to the Intent of the Indenture, without any lawful Impediment, Suit, Diſturbance, *Eject'*, *Contradict'*, *Moleſtand'*, Charge, Incumbrance, or Denial of the ſaid *A.* the Leſſor, and after *A.* enters upon *B.* and diſturbs him in taking the Profits, without any lawful Title, but as a Treſpaſſer. This is not any Breach of the Covenant, for that it is expreſly limitted, That he ſhall enjoy this without any lawful Diſturbance, and ſo a

Tortious Entry by the Leſſor.

Lawful Diſturbance.

Diſturbance by Tort is out of the Covenant. 1 *Rol. Abr.* 429. *Davy* and *Sacheverel. M.* 11 *Car.* 1. But if the Leſſor enters and ouſts him, though it be tortiouſly, it is a Breach. *Cave* and *Brooksby, ibid.* Tortious Entry.

If Leſſor covenants with his Leſſee, That he ſhall have and enjoy the Land, *quietè & pacificè ſine evictione & interruptione alicujus Perſonæ*, and after an Eſtranger enters *per* Tort; yet this is a Breach of the Condition, for that the Covenant is, That he ſhall not be interrupted in his Poſſeſſion. *Dier* 328. *a.* But *Hob.* in Sir *William Tiſdale* and *Eſſex*'s Caſe, is, That if Leſſor covenants with his Leſſee, *quod ipſe h'eret occuparet & gauderet*, the Land demiſed, and after a Stranger enters *per Tort*, and ejects him; this is not any Breach of the Covenant, for the Law will not conſtrue the Covenant to extend to tortious Acts, without expreſs Covenant. 2 *Cro.* 425. *Pl.* 10. *&* 144. *Pl.* 21. *Sem' cont' al' Dy'.* Where if a Stranger enters by Tort, it is a Breach, or not.

Covenant upon Articles, by which the Defendant covenants, That the Plaintiff ſhall enjoy a Cloſe quietly for a Year: Upon which the Plaintiff put in his Beaſts, and *K.* who had *Titulum virtute cujuſdam dimiſſiones ei inde fact' ante confection' articul' prædict'*, entered upon the Plaintiff, and expelled him, and after (*ſcil'*, ſuch a Term) brought Action of Treſpaſs againſt him, for putting Beaſts into the ſaid Cloſe, and that *talit' proceſs' fuit*, that *K.* recovered againſt the Plaintiff 20 *l.* Damages, and 17 *l.* Coſts; of which the Plaintiff had Notice, and ſo by the Non-quiet Enjoyment the Defendant had broke his Covenant. Iſſue upon this, and Verdict for the Plaintiff here. Moved in Arreſt of Judgment

Diſturbance by *K.* not ſhewing what Title *K.* had.

ment, for that he had not ſhewed what Title *K.* had, and it may be the Title which he had was under the Plaintiff himſelf; and there having been a Suit, wherein the Title of *K.* appeared, the Plaintiff ought to have ſhewed it, for now it is in his own Coniſance: *Sed non alloc'*, for the Title of *K.* cannot be ſuppoſed to be under the Plaintiff here; for the Declaration that *K.* had Title by vertue of a Demiſe, before the Articles made to the Plaintiff; and be the Title derived from who it will, being made before the Articles with the Plaintiff, the Covenant is broken, as *Procter* and *Newton's* Caſe. *Tr.* 23 *Car.* 2. *B. R. Rot.* 856. and Judgment *pro Quer'*, 3 *Lev.* 325. *Buckly* and *Williams. Intr. M.* 2 *W. & M. C. B. Rot.* 360.

That he was ouſted by *J. S.* who claimed under the Title of, *&c.* and ſhews not how.

Covenant was, That the Leſſee and his Aſſigns ſhall enjoy without the Interruption of *F. E.* and all others claiming under the ſaid *F.* and the Breach aſſigned is, becauſe he was ouſted by *J. S.* who claimed under the Title of *F. E.* and ſhews not how he claims under his Intereſt, nor by what Conveyances: It's not good, and for that Reaſon reverſed by all the Judges in the *Exchequer* Chamber. *Cro. Eliz.* 823. *White* and *Ewer.*

The Caſe is upon an Aſſumption.

The Defendant covenants to ſave the Plaintiff harmleſs, concerning the Poſſeſſion of ſuch an Houſe; and Breach is, That ſuch a one had evicted him, and the Defendant had not ſaved him harmleſs. *Verdict' pro Quer'.* It was moved in Arreſt, that it is not ſhewed that he was evicted by Title; and all Covenants extend only againſt legal Titles and Evictions. *Per Cur'*, this Agreement is only *quoad* the Poſſeſſion, not *quoad* the Title, and Judgment *pro Quer'*, 2 *Lev.* 194. *Gregory* and *Major.* 3 *Keeble* 744.

De-

Declared on Demiſe of a Meſſuage, *ſimul cum*, one Garden, *& Latrina* [*Angl.* Houſe of Office] *ad ulteriorem finem inde*, and covenant was, That he ſhould enjoy *dimiſſa Præmiſſæ*; and aſſigns a Breach, That the Defendant had erected on Part of the Garden a Manſion-Houſe, whereby the Plaintiff *uſum Gardine præd' ſecundum formam & effectum dimiſſ' præd' habere non potuit.* Defendant pleaded, That *non obſtante ædificat' præd'*, the Plaintiff, *uſum Gardini præd' habere potuit, ſecundum veram Intention' dimiſſor' præd' abſq; hoc quod ædificatio præd' aliquo modo impediret le* Plaintiff, of the Uſe of the ſaid Garden, *ſecundum veram Intentionem Indentur' præd'.* Plaintiff demurs. *Per Cur'*, the Uſe of the Garden, is the Uſe of all the Garden, and not the Uſe only to paſs to the Houſe of Office, as was pretended by Defendant; and the Traverſe contains more than is alledged in the Breach, *ſecundum veram Intentionem Indent' præd'*, and the Court cannot know the true Intention of the Indenture, but by the Words of the Indenture. 3 *Lev.* 167. *Kidder* and *Weſt.*

Traverſe contains more than is alledged in the Breach.

Action of Covenant, for that the Defendant, *non indempnem conſervavit ipſum de & concernente occupationem quorundem clauſorum, &c. ſecundum formam agreeament*, and ſets forth no Title in the Diſturber. *Cro. Eliz.* 914. *Cro. Jac.* 355, 425. *Vaughan* 120, 121. 2 *Sand.* 78. 1 *Mod. Rep.* 66. But this being after a Verdict, and the Plaintiff ſetting forth in his Declaration, That the Diſturber recovered *per Judicium Curiæ.* Judgment was given *pro Quer'*. 2 *Mod.* 213. *Major* and *Gregg.*

No Title ſet forth by the Diſturber, yet good after a Verdict.

Covenant is, That he ſhall ſuffer his Leſſee for Years to enjoy the Land during the Term, and that without the Trouble of him or of any other Perſon; a Stranger enters by Eigne Title, the Covenant is not broken, becauſe the Word [ſuffer] is a Paſſive, and all the Reſidue is to be referred to it. *Dier* 255. *a. Pl.* 4.

Shew how diſcharged.

Bond with Condition, That the Plaintiff ſhould have, hold and enjoy Land, acquitted from all Charge and Incumbrances; and for Breach, the Plaintiff ſheweth, that there was a Rent-Charge granted by the Predeceſſor, under whom the Defendant claimed, which is yet undiſcharged. Defendant demurred. *Per Cur'*, if the Acquittal refer to the Land it ſelf, or to the Perſon, the Defendant muſt ſhew how he hath diſcharged him from the very Rent. 1 *Keb.* 927.

To hold Lands free from all Titles and Incumbrances.

In Action of Covenant to perform Articles; which were, That the Plaintiff ſhould hold and enjoy Lands free from all Titles and Incumbrances; and for Breach, the Plaintiff ſhewed, That *B.* died ſeiſed, and that his Wife had Title to Dower. Plaintiff demurs. *Cur'*, This Covenant goeth to the Land, and there can be no difference between a Covenant to diſcharge the Land of all Titles, and that the Defendant ſhall hold the Land ſo diſcharged. 1 *Keb.* 937. *Andrews* and *Tanner.*

Where a Man muſt ſhew, that the Entry was by good Title or eigne Title, and where he need not.

A Man makes a Leaſe for Years, and covenants, That neither he himſelf, nor his Heirs or Executors, ſhall interrupt; and in Action of Covenant brought for the Entry of his Executors, the Plaintiff need not ſhew that the Executors entered upon any eigne or good Title, for it is all one, where the

the Action is brought againſt the Covenantor, or his Executors; *aliter* where a Stranger enters, for that the Plaintiff ought to ſhew that he entered upon *Eigne Title*, and upon good Title. 2 *Rol. Rep.* 21. *Force* and *Vines*. 1 *Brownl.* 80. *Ratcliff*'s Caſe.

In Covenant, the Plaintiff declared upon Articles of Agreement made between *Williams*, on the behalf of *T. M.* of the one Part, and *Raſhly* of the other Part: It was agreed between the Parties, that the ſaid *Raſhly*, *quiete & pacifice haberet & occuparet tenement' vocat' S.* for one Year, except *dimiſſione præd' cuidam* Edw. Knowles, *nuper tenent' Præmiſſ' unum parvum clauſum parcellum Præmiſſorum*, and that *Raſhly* ſhould pay 20 *l.* by Quarterly Payments for the ſaid Year; Plaintiff ſet forth he entered and put in his Cattle, and before the Year was out, *Knowles* ſued *Raſhly* in Treſpaſs, and recovered Damage and Coſts, which he was forced to pay, and ſo he did not hold the Premiſſes quietly. *Per Cur'*, the Declaration is not good, for it is not ſet forth that *Knowles* had any Right, for the Articles amounted to a Leaſe; but if it had been a Collateral Covenant by a Stranger, it would be hard to extend it to a Tortious Entry. *Cro. Jac.* 425. Where the Promiſe was to enjoy without the Interruption of any Perſon; and yet holds, that a Title ought to be ſet out. *Dier* 128. *a.* 1 *Rol. Abr.* 430. *contra.* This is no Covenant expreſly againſt *Knowles*, for he is only mentioned in the Part excepted. 2 *Vent.* 59. *Raſhly* and *Williams*.

Declaration not good, becauſe he ſets not forth that the Diſturber had any Right.

A Covenant, that the Indenture of a Leaſe at the Time of the Aſſignment is a good, true, and indefeaſible Leaſe, and that

the Plaintiff ſhall enjoy, *&c.* without the Let or Interruption of the Defendant, or of any claiming by, from, or under him; and ſhews for Breach, that before he that made the Leaſe had any Thing, one *J. S.* was ſeized in Fee, and that he which made the Leaſe entered upon him and diſſeiſed, and leaſed *prout*, and that *J. S.* re-entered upon him; upon which Replication the Defendant demurs. *Per Cur'*, The Words, [indefeaſible Leaſe] ſhall be conſtrued as a diſtinct Sentence from the laſt Words, That he ſhall enjoy it without the Interruption of the Defendant. *Sid.* 328. *Gainsford* and *Griffith.* 1 *Sanders* 51. 2 *Keeble* 201.

[Indefeaſible Leaſe.]

Note, If I covenant with *B.* to enter into a Bond to him for Enjoyment of ſuch Lands, and do not expreſs what Sum, he ſhall be bound in ſuch a Sum as amounteth to the Value of the Land. 5 *Rep.* 78. *a. Samon's* Caſe. Defendant's Caſe *ſupra.*

Covenant to enter into Bond for Enjoyment of ſuch Lands, and names no Sum.

Action is brought againſt the Heir of *Edm. A.* the Condition was, Whereas the ſaid *Edm. A.* ſuch a Day, hath granted and given to the Plaintiff the Preſentation to the Church of *D.* if therefore the ſaid *Edm. A.* from Time to Time ſhall make good the ſaid Grant from all Incumbrances made, or to be made, by him and his Heirs, that then, *&c.* The Grantor died, the Church became void, the Heir of the Grantor preſented: This tortious Preſentation is no Breach, but this extends only to lawful Diſturbance by the Heir, for it appears by the Pleading, that the Heir had no Right to preſent, his Father having granted it before. *Per Hobart*, the Words ſhall be conſtrued as if they had been, that he ſhall enjoy

Wherein a tortious Diſturbance ſhall be a Breach of the Condition, and where not.

enjoy the ſame from any Act or Acts made by him or his Heirs; and in this Caſe, there ought to be a lawful Eviction to make a Breach of the Condition; but otherwiſe, if the Condition had been, that he ſhall peaceably enjoy from any Act or Acts made by him or his Heirs, for in this Caſe a tortious Diſturbance would have been a Breach of the Condition. *Winch.* 25. Dr. *Hant verſus Allen.*

Covenant and aſſigns for Breach Nonpayment of Rent; Defendant pleads, a Bargain and Sale for Money for 100 Years before that Time of the ſame Land, made to *Allen*, and pleads the Statute of Uſes, and then ſhews the Attainder of *Allen* for High Treaſon, and that by this Attainder it is veſted in the King; and pleads the Act of Attainder, and the Exceptions, and it was demurred to this Plea upon 4 *Rep.* 53. and *Dier* 256. becauſe he had not pleaded, that *Allen*, or any under him, had not entered upon the Lands, and without Entry and Expulſion of the Defendant, he ſhall not be diſcharged of the Rent; but it was ſaid, it being upon the Statute of Uſes, no Entry was requiſite: But the greateſt Doubt was, the Title is in the King, and the King is in Poſſeſſion without Entry, and the Party is in Poſſeſſion, *ſcil'* the Defendant accountable to him for the Profits. In *Keeble*, the Court agreed this a good Leaſe, by Way of *Eſtoppel*; and if the Rent be in being, the Covenant remains, *& è contra*, if not: And *per Cur'*, this is a ſufficient Eviction without Entry or Office alledged, nor need any Entry be laid by the firſt Leſſee, he being ſaid in Poſſeſſion by vertue of the Statute; and the King

is in actual Poſſeſſion as much as if the Party had entered actually, though a common Perſon ſhould not be ſaid to be in Poſſeſſion without Entry, by himſelf, or the firſt Leſſee. Now this cannot be good as a Leaſe in Reverſion, being not ſo pleaded, but as a Grant of the preſent Eſtate, but all agreed upon Aſſignment of the Leaſe there muſt be Attornment. The Plaintiff has declared on a Leaſe in Poſſeſſion, as at Common Law, which is avoided by Eviction. Judgment *pro* Defendant. 1 *Sid. p.* 399. 2 *Keb.* 364, 444. *Banks* and *Smith.*

Not to be good as a Leaſe in Reverſion, being not ſo pleaded but as a Grant of the preſent Eſtate.

Covenant not to moleſt.

Covenant (in a Leaſe for Years of a Manor) That the Leſſee ſhall not moleſt, vex or put out, any Copyholder, *&c.* Breach was, That the Defendant, *vi & armis*, entered upon a Copyhold, *&c.* in a Cow-Houſe, Parcel of the Premiſſes, *& ſic moleſtavit*, *&c.* This is not any Breach, for the Moleſtation is to be intended of ſuch Sort, that he may ouſt him of his Copyhold, either by diſtreining, that he could not enjoy it quietly, or by ſome other Vexation, whereby he was forced to relinquiſh his Poſſeſſion; and the Wrong is only here done to his Perſon, and not to his Copyhold Tenement, and ſo no Breach. *Cro. Eliz.* 421. *Penn* and *Glover.*

What Moleſtation ſhall be intended.

C. Cornwallis granted the next Avoidance, *&c.* to *March*: *March* aſſigned it to *Lewins*, to preſent to the ſame Church when it ſhall become void; and covenanted, That the ſame Perſon who ſhall be ſo preſented by him ſhall enjoy it without the Let or Diſturbance of the ſaid *Cornwallis* or *March*, or any of them, or any by their Procurement. *Lewins* preſents *J. S.* and after

ter *J. M.* preſented another, claiming the firſt and next Avoidance by the Procurement of *Cornwallis*; and ruled, That the Declaration was not good, for it ought to ſay, That *Cornwallis* granted to *J. M.* the next Avoidance, and procured him to diſturb, and that by his Procurement he was diſturbed, *Winch.* 4. *Lewins* and *March.*

Declaration on Diſturbance by Procurement.

Leſſor covenants with his Leſſee, That he hath not done any Act to prejudice the Leaſe, but that the Leſſee ſhall enjoy it againſt all Perſons; theſe Words [againſt all Perſons] ſhall refer to the firſt, and be limitted to any Acts done by him. *Winch. p.* 4.

Defendant pleaded, he had a good Title at the Time of the Covenant, by vertue of certain Fines from Sir *P.* and his Wife, and that in 13 *Car.* 2. there was an Act of Parliament by which theſe Fines were declared void, and that Sir *P.* had Title, and entered, by reaſon of the Act: The Act which was pleaded recites, That certain Men came with Force and Arms, and extorted the Fines, Plaintiff demurred. *Per Cur'*, the Covenant is broken, though the Defendant cannot intend to covenant againſt an Act of Parliament, nor has the Defendant Cauſe to complain, becauſe the Act was made becauſe of his own Force and Fraud. 1 *Vent.* 175. *Lucy* and *Levington.* 2 *Lev.* 26. *Meſme* Caſe. *Et* 2 *Keeble* 831.

Baron and *Feme* levied a Fine; *J. S.* covenants, That the Coniſee ſhall enjoy it againſt all lawfully claiming from *B.* and *F.* brings Dower after the Death of *B.* the Coniſee doth not plead the Fine, but ſuffers Judgment, and brings Covenant againſt *J. S.* and it was adjudged againſt him, for the Cove-

nant ſhall not extend to a Right that is barred; and beſides, ſhe did not claim lawfully. *Ibid.* Cited *per Twiſden.*

The Breach was aſſigned in not quiet Enjoyment: Defendant pleads, the Leaſe was made to him from *Michaelmas* 61, to *Michaelmas* 68. and that paying ſo much half Yearly, he ſhould enjoy quietly; and ſhews he did not pay the laſt half Years Rent ending at *Michaelmas* 68. Defendant demurs, ſuppoſing the Words, [being to *Michaelmas* 68], there was not an entire half Year, the Day being to be excluded, and for that, *Vide* 1 *Cro.* 702. *Per Cur'*, it is true in Pleading, *uſq; tale feſtum* will exclude that Day; but in Caſe of Reſervation, the Conſtruction is to be governed by the Intent. 1 *Vent.* 292. *Pigot* and *Bridge.*

Covenant, That he ſhall have and enjoy. Breach, That *J. S.* brought Treſpaſs and recovered; it was moved in Arreſt of Judgment, becauſe it doth appear that he that recovered had Title. Serjeant *Levins*, here is an expreſs Covenant, That he ſhall enjoy, and he is diſturbed in his Poſſeſſion, though upon no Title. *Dier* 328. *a. Vaughan* 120. *Hob.* 35. 2 *Vent.* 46.

The Breach aſſigned was, That *B. habens jus Precedens*, to the Plaintiff's Conveyance, *Virtute Tituli* did enter, and good, though it had been plainer to have ſaid, *Legale jus (contra, Yelv.* 30.) Had the Covenant been againſt the lawful Title of *J. S.* the Breach muſt have been ſo. 3 *Keb.* 41. *Procter* and *Newton.*

Leſſor covenants, That the Leſſee ſhould peaceably and quietly enjoy the Land let during the Term; Plaintiff declares, That a Stranger entered upon him, and ouſted him, with-

within the Term. *Per Rolls*, the Covenant in this Caſe is broken, though he be a Stranger. *Stiles p.* 67.

Leſſor covenants, That the Plaintiff and his Wife ſhall enjoy it during the Term, without the Interruption of him, or *J.* his Wife, and the Expulſion is laid of the Plaintiff only, yet it's good, becauſe the Husband hath the ſole Profits and Poſſeſſion; and although the Entry of the Leſſor is not alledged to be by Title, ſo as he is meerly a Tort Feaſor, and though he might have Action of Treſpaſs againſt him. *Cro. Jac.* 383. Lady *Platts* Caſe.

A. leaſed to *B.* certain Land for 40 *l. per Annum*, and a Stranger covenanted with *A.* That *B.* ſhould pay unto him the 40 *l.* for the Farm, and Occupation of the ſaid Land: *A.* brought Action of Covenant, Defendant pleaded, That before the Day of Payment the Plaintiff ouſted *B.* of his Farm: It was moved, That it was no Plea, becauſe this was a collateral Sum, and not for Rent iſſuing out of the Land; alſo, the Defendant is a Stranger to the Contract for the Farm. *Curia contra*, for the Defendant hath covenanted, That the Leſſee ſhall pay for the ſaid Farm and Occupation 40 *l.* ſo it is as a Conditional Covenant; and here is, *Quid pro Quo'*. And here the Conſideration upon which the Covenant is conceived, (*ſcil'*) the Farm and the Occupation of it is taken away by the Act of the Plaintiff himſelf. 2 *Leon.* 115. *Bedill's* Caſe.

In Action of Covenant a Breach was aſſigned by the Leſſee, That he did not quietly enjoy it, *&c.* Leſſor pleads in Bar, that the Covenant was, That the Leſſee performing

Performing Covenants and paying the Rent.

the Covenants, and paying his Rent, ſhould quietly enjoy, *&c.* *Per Windham*, theſe Words, [Paying the Rent] is no Covenant Precedent, but rather Concomitant, and is liable to Conſtruction as the ſubject Matter is; but here clearly it can be no Condition, being an uſual Clauſe at the end of all Leaſes. *Per Cur'*, and yielding and paying makes no Condition, in *Babington* and *Allen*'s Caſe. 2 *Keb.* 9. 23. *Sid.* *Vide* 1 *Keb.* 895. *Cox* and *Griffith.*

Covenant, for that the Teſtator ſold to the Plaintiff 20 Tun of Copperace, and agreed with the Plaintiff, That if he failed of the Payment of ſuch a Sum at ſuch a Day, that he might quietly have and enjoy the ſaid 20 Tun of Copperace; and alledged *in facto*, That the Money was not paid at the Day, *& quod non potuit habere & gaudere*, the ſaid 20 Tun of Copperace. Action was brought, and Judgment was againſt the Defendant, by *nihil dicit*, and a Writ of Enquiry of Damages awarded, and 260 *l.* Damages retorned. *Per Cur'*, the Declaration is not good, in that he aſſigned not a ſufficient Breach, *Quod non potuit habere & gaudere, &c.* without ſhewing how, and by whom he was diſturbed, is not ſufficient, for it ought to appear to the Court that it was a lawful Diſturbance, otherwiſe there is not any Cauſe of Action; for the Goods being ſold to him, if he were legally diſturbed, he hath a ſufficient Remedy, and is not to maintain an Action of Covenant; and of this Opinion was all the Court: And though Judgment was given againſt the Defendant by *nihil dicit*, yet *per Cur'*, he came time enough to alledge this Matter, for until the laſt Judgment he may

Quod non potuit habere & gaudere, without ſhewing how.

If it were a lawful Diſturbance, no Covenant lies.

Judgment by *nihil dicit.*

may well inform the Court of the Inſufficiency of the Declaration; and the Court ſeeing it inſufficient, ſhall abate it. *Cro. Eliz.* 914. *Chantflower verſus Prenſtly Uxor, &c. Yel.* 30. *Meſme* Caſe.

Covenant, for that the Defendant 35 *Eliz.* let to him the *Barton* of *B.* for 6 Years, and covenanted, That he ſhould enjoy it during the Term quietly, and diſcharged from Tythes, *&c.* and further, That if the Tythes were demanded and recovered againſt him during the Term, that he ſhould recoup in his Hands ſo much of the Rent as the Tythes amounted to: For Breach he ſheweth, that in 42 *Eliz.* the Perſon ſued him for the Tythes of Corn growing there in the Years 38th and 39th of *Eliz.* whereupon it was demurred. *Per Cur'*, This Suit, after the Determination of the Term, was a Breach of Covenant, for he did not enjoy it diſcharged, *&c.* which is not intended of a real Diſcharge, for it appears not to be the Intent of the Parties, becauſe it is agreed, that if he were ſued he ſhould recoup as much of the Rent in his Hands; but their Meaning was, he ſhould be freed from Suit and Payment of it; and he is as greatly prejudiced by a Suit after the Term, as if he had been ſued before the expiration of the Term: But becauſe it was not alledged that the Suit was lawful, or that the Tythes were due, (for he was not bound to diſcharge him from illegal Suits) the Breach was not well aſſigned. *Cro. Eliz.* 916, 917. *Launing* and *Lovering*.

Suit on quiet Enjoyment, after the Determination of a Term, a good Breach if well aſſigned.

Covenant

Covenant to give Security upon Procurement of an Office to pay ſo much Yearly.

The Defendant covenanted, Whereas the King had granted the Office of *Aulnegeor* to the Duke of *Lenox*, who had made the Plaintiffs his Deputies for 7 Years, of all Places except *Colcheſter*; that the Defendant covenanted with them, Whereas the ſaid Duke had made a Deputation of that Office in *Colcheſter* for two Years, he would procure a Deputation to them for 7 Years, in the ſame Manner as *Everden* had it; Proviſo, That they upon the making thereof ſhould give Security for the Payment of 100*l.* *per Ann.* Rent for it, and Performance of Covenants; and they alledged, that they were always ready to give Security for the Rent, and the Defendant had not procured the Deputation. Defendant demurs: 1. Becauſe they do not alledge Performance of the Promiſe, but only a Readineſs to have given Security; *Sed non alloc'*, for they need not give Security till Deputation made, and the Non-performance of the Promiſe ought to come on the other Part. 2. Becauſe it is not ſhewed that they required a Deputation to be made, and the Quality how the other was made, nor *in facto*, that there was any Deputation made to *Everden*; *Sed non alloc'*, for the Covenants mention that there was a Deputation, and he is eſtopped to ſay the contrary; and at his Peril he ought to procure ſuch a one to the Plaintiffs as the other was, and that the Defendant ought to procure it immediately after the two Years expired, that the Plaintiffs might not loſe the Profits thereof after they were due. 3. Becauſe they ſhewed not the Breach according to the

Security need not be given till Deputation made.

the uſual Form, *Et ſic non tenuit conventionem in hoc, &c. Sed per Cur'*, there being a Breach thereof ſufficiently alledged, they need not make a Repetition. *Cro. Jac.* 297. *Berwick verſus Gibſon, in Com' Scac'.* The Concluſion, *Et ſic non tenuit conventionem in hoc*, omitted.

Debt on Bond of 120 *l.* for Performance of Covenants, by G. *Butterfield verſus N. Marſhal.*

Plea, That the Indenture was made ſuch a Day, *&c. Per que Teſtatum exiſtit'*, That *W. M.* had given and granted to the Plaintiff one Meſſuage, *&c. ac etiam Libertat', ingreſſ', egreſſ', & regreſſ', ad omnia tempora extunc ad prædict'* G. B. (the Plaintiff) *hered' & aſſign' ſuis ad pro & tranſ', &c. ac etiam in tranſ' & a longo atrio, &c. ad puteum* [*Anglice*, the Well] *adjungen' & ſive exiſten' prox' ad domum, &c. ibid. haurire & petere aquam ibid. pro ejus & eorum neceſſar' & convenien' occaſionibus & uſibus ipſo & ipſis ſolven' unam tertiam partem onerum quo de tempore in tempus contingerint cira reparationem dicti putei & funium ſucularum*, [*Angl'* Curbs] *Hauſtrior'* [*Angl'* Buckets] *& Utenſil ad inde pertin. Hab.* in Fee, Covenant to warrant the Premiſſes. Covenant, That the Defendant, *ad tempus ſigilliationis & deliberationis ejuſdem Indenture ſtetit & fuit ſeiſit' de & in dicto Meſſuagio & Præmiſſis cum pertin' & qualibet parte inde de & in bono certo Legali abſoluto & indefecibili ſtatu hereditat' in feodo ſimplici in poſſeſſione abſq; aliqua conditione vel limitatione aut al' materia vel re quacunq; in al' Perſona ſive Perſonis quibuſcunq; ad alterand', mutand', aut deſtruend' eundem.* And alſo, that he the ſaid *William Marſhal* had full Power, *&c.* to grant, *&c. Et quod ipſe dict.* George Butterfield, *hered' & aſſign' ſui de tempore in tempus & ad omnia tempora extunc legitime pacifice & quiete herent', tenerent & gauderent, Meſſuag' & Præmiſſa præd cum pertin' & quamlibet* Liberty of *ingreſſ', egreſſ', & regreſſ'*, to and from a Well for Water.

Covenant to give Security upon Procurement of an Office to pay ſo much Yearly.

The Defendant covenanted, Whereas the King had granted the Office of *Aulnegeor* to the Duke of *Lenox*, who had made the Plaintiffs his Deputies for 7 Years, of all Places except *Colcheſter*; that the Defendant covenanted with them, Whereas the ſaid Duke had made a Deputation of that Office in *Colcheſter* for two Years, he would procure a Deputation to them for 7 Years, in the ſame Manner as *Everden* had it; Proviſo, That they upon the making thereof ſhould give Security for the Payment of 100*l.* *per Ann.* Rent for it, and Performance of Covenants; and they alledged, that they were always ready to give Security for the Rent, and the Defendant had not procured the Deputation. Defendant demurs: 1. Becauſe they do not alledge Performance of the Promiſe, but only a Readineſs to have given Security; *Sed non alloc'*, for they need not give Security till Deputation made, and the Nonperformance of the Promiſe ought to come on the other Part. 2. Becauſe it is not ſhewed that they required a Deputation to be made, and the Quality how the other was made, nor *in facto*, that there was any Deputation made to *Everden*; *Sed non alloc'*, for the Covenants mention that there was a Deputation, and he is eſtopped to ſay the contrary; and at his Peril he ought to procure ſuch a one to the Plaintiffs as the other was, and that the Defendant ought to procure it immediately after the two Years expired, that the Plaintiffs might not loſe the Profits thereof after they were due. 3. Becauſe they ſhewed not the Breach according to the

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Debt on Bond of 120 *l.* for Performance of Covenants, by G. *Butterfield verſus N. Marſhal.*

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Liberty of *ingreſſ', egreſſ', & regreſſ'*, to and from a Well for Water.

libet

libet pertin' inde abſq; ill' legali impedimento moleſtatione aut interruptione quibuſcunq; de ipſo W.M. *Hered' Executor' vel Aſſign' ſuis aut ull', al' Perſonæ ſive Perſonis legit' claman' a per vel ſubter eum vel eos a quibus ipſe clamabat ac etiam exonerat' acquietat' & liberat' de & ab omnibus & omnimodes prior' aut aliis Barganiis venditionibus, &c. ac de & ab omnibus aliis titulis moleſtiis oneribus & incumbranciis quibuſcunq; habit' fact' permiſſ', Commiſſ', vel perpetrat'* [*Angl'* done] *per ipſum* W. M. *Hered', Exec' & Adminiſt' ſuos aut per ull' al', Perſonam vel Perſona, quaſcunq; legitime claman' a per vel ſubter eum eos aut aliquem eorum.* And the ſaid *W. M.* further covenants for himſelf, *&c.* That he the ſaid *W. M.* and *Maria* his Wife, *& eorum Hered' ac omnes & ſingul' al' Perſona & Perſonæ & eorum hered' tunc habentes, clamantes aut pretendentes, Here ull' Legale Titulum Statuum jus, &c. de tempore in tempus & ad omnia tempora extunc infra ſpatium 7 annorum, &c. facerent, &c.* Further Aſſurance, *(viz.) tal' ulter' & alia legalia & renabilia actu' & acta rem & res deviſament' & deviſamenta, aſſurancia, & conveyanciam in Lege, &c. foret per finem, fines, Feoffment, recupation', &c.*

Defendants plead general Performance. *Quod bene & fideliter, performaver', obſervaver', pimplever', tenuer' & cuſtodiver' omnia & ſingula Conventiones, Conceſſiones, &c. Ex ejus & eorum partibus & vicibus obſervand' performand', &c. Secundum formam & effectum Indenture illius & Conditionis præd'. Et hoc paratus.*

Replic'. *Perclud' non. Quia proteſtando quod præd'* W. M. *non performavit aliquod in Indentura prædict' content' ex parte ſua per implend' in fact' idem* Geo. *dicit quod præd'* Willielmus, *ad præd' tempus ſigillationis & deliberationis, Ind' præd' non fuit*

ſeitus de pluteo præd' in feod' ſimplic' ſecundum formam & effectum conventionis ſuæ præd' in Indentura ſua præd' ſuperius content' prout præd' Nicholaum *ſuperius placitando allegavit. Et hoc petit quod, &c.*

One Exception was taken by the Defendant's Council to the Replication, for that the Plaintiff had aſſigned a Breach, That the Defendant, at the Time of the Sealing, *&c.* of the ſaid Indenture, was not ſeized in Fee of the ſaid Well, where there was not any Covenant in the Indenture, that he was ſeized in Fee: And of this Opinion was all the Court. But the Defendant ought to have alledged, That the Plaintiff had not any Power to grant the ſaid Liberty to draw Water out of the Well.

Breach not well aſſigned.

An Exception was taken to the Plea, that it was not good, for in the Indenture there is a Covenant for quiet Enjoyment, without Interruption of any Perſon, *&c.* claiming under *W. M. &c. ac etiam exonerat' acquietat', &c. de & ab omnibus incumbrancis, &c.* and to ſuch Covenant the Plea of Performance generally is not good: But the Defendant ought to have pleaded, That the Lands at the Time of the Conveyance were not incumbred in any Manner; but the Plea, as it is now, as much as if he had ſaid, That he had diſcharged the Lands of all Incumbrances; which is ill, for he ought to have ſhewed how.

Covenant for quiet Enjoyment.

It was further objected to the Plea, that it was not good in Reſpect of the Covenant for further Aſſurance, for it is, that he ſhall make all further Aſſurance, either by Fine, Feoffment or Recovery, or all of them, or ſome

Covenant for further Aſſurance.

ſome of them, or by other Means, as ſhall be by Plaintiff or Council adviſed or required: To this Covenant he ought to have pleaded, either that no Aſſurance was deviſed and required, or that ſuch Aſſurance was deviſed and required, and no other, and that he had executed that which was deviſed and required; and it is commonly pleaded in the Books, *Quod Concilium non dedit adviſament'*, which is a Proof that Performance generally is not a good Plea. Theſe Exceptions were proved by the Precedents. *Coke Entr.* 65. *b.* & *c.* 135. *b.* &c. 147. *a. b.* 244, 245, & 635. *a. b.*

But the Court was of Opinion, That the Plea was good in Subſtance, though it was not the beſt ſort of Pleading; it was ſaid, That the better ſort of pleading Performance of Covenants for further Aſſurance was as is before objected, and to maintain the Plea Caſes of Chapman. *Cro. Car.* 76. *Briſco* and *King*. *Cro. Jac.* 281. 2 *Mod.* 36. *Lit. Pl.* 193. But *per Cur'*, admitting the Bar was not good, yet for as much as it appears that the Plaintiff by his own ſhewing had no Cauſe of Action, he cannot have Judgment; and he had Leave to diſcontinue. 1 *Lut. Butterfield* and *Marſhal.*

CHAP.

CHAP. XXII.

Covenant to make Aſſurance.

IF a Covenant be, to aſſure certain Lands to ſuch Perſon as the Covenantee ſhall name, and after he aſſures this to the Covenantee himſelf; this is a good Performance of the Covenant, though it be not alledged that he named himſelf, for this Acceptance is a Nomination of himſelf. *M.* 13 *Jac. Houſy* and *Wild.*

To aſſure ſuch Land to ſuch Perſon as the Covenantee ſhall name.

If Covenant be to make ſuch Aſſurance to the Covenantee as the Covenantee ſhall adviſe, and after the Covenantee deviſeth an Indenture, and tenders it to him, and he requires Time to ſhew it to his Counſel to adviſe with, which the other denies to him, yet if he ſeal it not preſently, the Condition is broken. 2 *Rep.* 3. *Manſer's* Caſe.

Time to adviſe with Councel.

If one covenant to ſurrender a Copyhold Eſtate to the Uſe of *A.* and his Heirs, it muſt be an effectual Surrender, and it's no compleat Surrender till it be preſented in Court, and he ought to procure it to be ſo done: As if a Man covenant to make a Feoffment to me upon Requeſt, if I requeſt him to make a Deed of Feoffment, with Letter of Attorney to *B.* to make Livery to me, and he doth this accordingly, this is a good Inception; yet if Livery be not made, it's a Breach. *Shaun* and *Belly. Tr.* 1651.

If one covenant to ſurrender Copyhold Eſtate, it muſt be an effectual Surrender.

In Covenant on Articles, to pay upon St. *Thomas*'s-*Day*, the Plaintiff making a good Eſtate, *& licet*, the Plaintiff had performed, though Defendant did not. Defendant pleads ready to Pay and Tender, and that the Plaintiff made no Aſſurance. The Plaintiff replied, That he ſealed a Feoffment, and the Defendant neglected to take Seiſin. Defendant demurs, becauſe here is no ſufficient Averment without Notice of the Character made, and when and how he will execute it; for he, making a good Eſtate, is a Condition Precedent to the Payment, which the Court agreed; and where a Precedent Condition is expreſs'd, it muſt be averred in the Declaration, and a *Licet*, the Party had performed all on his Part is not ſufficient: Judgment *pro* Defendant. *Large* and *Cheſhire*. 2 *Keb.* 801. 1 *Ventr.* 147. *Meſme* Caſe.

What is not a reaſonable Aſſurance.

A. covenants with *B.* to make ſuch reaſonable Aſſurance to *B.* in Fee of ſuch Land, reſerving to *A.* and his Heirs 20 *l.* Rent *per Annum*, as Council ſhall adviſe, and after *B.* tenders to *A.* a Deed-Poll, by which *A.* ſhall enfeoff *B.* of Land in Fee, reſerving the ſaid Rent to *A.* in Fee: This is not any ſuch reaſonable Aſſurance to bind *A.* to ſeal it, for this is a Rent-Seck, and the Deed belongs to the Feoffee; and then *A.* without the Deed cannot have any Remedy for the Rent. 1 *Rol. Abr.* 423. *Guppage* and *Aſcue*, it ought to have been a Feoffment by Indenture rendering Rent.

The Condition or Covenant is to make an Eſtate of Inheritance to the Obligee or Covenantee, at ſuch a Day and Place: The Defendant pleads, He was ready at the Day and Place to make it, *&c.* Plaintiff demurs.

Per

Per Cur', the Plea is ill, he ought to give Notice what Eſtate of Inheritance he would make him. *Stiles* 61. *Allen* 24. *Brook* and *Brook*. 5 *Rep.* 22. Notice of what Eſtate he will make him.

If a Man covenants to make a Conveyance of certain Lands; if a Warranty or Covenant be put into the Deed, he is not bound to ſeal it. 1 *Rol. Abr.* 424. *Raym.* 190. 2 *Cro.* 571. Warranty or Covenants not to be put in.

The Condition or Covenant is to make ſuch Aſſurance to the Obligee or Covenantee as the Obligee or Covenantee ſhall deviſe; and after the Covenantee deviſeth an Indenture and tenders this to him, and he requires Time to ſhew it to his Councel, he muſt ſeal it preſently, for the Covenant is peremptory. 1 *Anderſon* 122. Caſe 117. *Andrews* and *Eddon*. 1 *Rol. Abr.* 424. *Wooton* and *Crook*. 2 *Rep.* 3. *Manſer*'s Caſe. Time to adviſe.

If a Man is bound to make good abſolute perfect Aſſurance in Fee of Copyhold Lands, or others, it muſt not only be an abſolute, but an effectual Conveyance. If a Man be bound to ſurrender a Copyhold to the Uſe of *A.* and his Heirs, on Conſideration of Money, if he ſurrender into the Tenant's Hands, he muſt get it preſented, for it muſt be an effectual Surrender. As if a Man be bound to make a Feoffment to me upon Requeſt, if I requeſt him to make a Deed of Feoffment, with Letter of Attorney to *B.* to make Livery to me, and he doth ſo, this is a good Inception; yet, if Livery be not made, it is a Forfeiture of the Condition. 1 *Rol. Abr.* 425. *Shaw* and *Belby*. Covenant to make a Feoffment, he muſt make Livery.

One is bound to aſſure 20 Acres of Land, the Acres ſhall be accounted according to the Eſtimation of the Country where the How Acres ſhall be accounted.

Lands lie, and not according to the Meaſure limitted in the Statute. *Cro. Eliz.* 665. *Some* and *Taylor.*

A Man by Deed indented, bargained and ſold Lands to another in Fee, and covenanted by the ſame Deed, to make him a good and ſufficient Eſtate in the ſaid Lands before *Chriſtmas* next, and afterwards before *Chriſtmas* the Bargainor acknowledged the Deed, and the ſame is enrolled. *Per Cur'*, by that Act the Covenant is not performed, for he ought to have levied a Fine, or made a Feoffment. 3 *Leon. p.* 1. *Bendle, Numb.* 15.

Where a Bargain and Sale inrolled doth not make a ſufficient Eſtate.

In Covenant to make Aſſurance, who to do the Firſt Act.

One covenants to make an Eſtate in Fee at the Coſts of the Covenantee, the Covenantor is to do the Firſt Act, (*viz.*) To let him know what Conveyance he will make: So *Twiford* and *Buckley*'s Caſe, upon an Indenture of Covenants; wherein one of the Parties did covenant to make a Leaſe for the Life of the Covenantee, and for Two other Lives as he ſhould name, and the Covenantor was to give Poſſeſſion. The Breach aſſigned was, That the Defendant had not made Livery and Seiſin, and upon Performance pretended, the Plaintiff did demurr; and, upon great Debate, it was reſolved that the Covenant was not broken, for that the Plaintiff had not done that which was firſt to be performed on his Part, (*viz.*) to name the Lives. 2 *Mod.* 75.

Covenant or Statute with Defeaſance, to make ſuch good Aſſurance of an Houſe to *W.* with ſuch Covenants which he ſhould ac-

accept and ſignify under his Hand to be reaſonable, or ſhould pay to him before the 1ſt of *Auguſt* 350 *l.* He ſurmiſeth he was always ready to make the Aſſurance, and that the ſaid *W.* had not ſignified what Aſſurance he would accept, nor required any. *Per Cur'*, He is not bound to deviſe any Aſſurance or Eſtate; but it is in his Election to accept an Eſtate tendered, or the Money, and there cannot be an Acceptance but where there is a Tender on the other Party, and therefore the other Party ought to have deviſed the Eſtate, and procured *W.* to accept thereof, otherwiſe he ought to pay the Money. *Cro. Eliz.* 718. *Mills* and *Wood.*

Covenantor covenanted with the Covenantee, That he, at the Coſts of the Covenantee, would aſſure ſuch Lands to him before ſuch a Day; the Covenantor ought to do the Firſt Act, *(viz.)* To give Notice what Aſſurance he will make, ſo as the other may know what Coſts he is to tender; *aliter*, if he covenant to make ſome certain Aſſurance, as Fine, Feoffment, *&c. Cro. Eliz.* 517. *Hallings* and *Connard. Owen* 157. *Moo.* 457. *& 5 Rep.* 22. *Meſme* Caſe; and it's all one when the Covenant is general, and when it is particular, as to make a Feoffment, the Covenantor ought to do the Firſt Act there if he will have it by Parol or Indenture.

Notice where needful or not.

The Aſſurance ought to be drawn according to the Covenant; it was agreed 22 *Jan.* 28 *Eliz.* That the Defendant ſhould make an Indenture of Bargain and Sale of all the Lands, which the Defendant then had in *Yarmouth*, and on 14 *Sept.* 29 *Eliz.* the Plaintiff tendered to the Defendant an Indenture of Bargain of all the ſaid Lands, which he then

Indenture of Bargain and Sale not warranted by the Agreement.

then had in *Yarmouth*, *Hab'* to him and his Heirs, *ſecundum Concluſionem & Agreeamentum præd'*, which the Defendant refuſed to ſeal. The Indenture of Bargain and Sale is not warranted by the Agreement, becauſe it may be he had other Lands on the 14th of *Sept.* 39 *Eliz.* than he had at the Time of the Agreement, ſo need not to ſeal it, though in Truth he had not any more Lands: Tho' *Poph.* ſaid, if he had more Lands he ought to have ſhewed it. *Cro. Eliz.* 660. *Keeble* and *Brown.*

Aſſurance agree in Subſtance with the Covenants, good.

If the Aſſurance drawn agrees in Subſtance with the Covenants, though they vary in Words, it is not material; as if it were covenanted to aſſure all his Lands in *D.* and the Aſſurance is drawn by particular Names: It is good. *Ibid.*

When I am obliged, that *J. S.* who is a Stranger, ſhall levy a Fine to the Obligee, the Obligee is bound to ſue forth a Writ of Covenant, for it's no Reaſon to compel the Obligor, who is a Stranger to the Eſtate that paſſeth by the Fine, to ſue a Writ of Covenant; but if I am obliged to you, that *J. S.* ſhall levy a Fine to *J. N.* in ſuch Caſe the Fine ought to be levied at my Peril, though *J. N.* will not ſue a Writ of Covenant. *Winch.* 29. *Hill* and *Waldwin.*

If one do covenant generally to levy a Fine of Lands, he is not bound thereby to go before Commiſſioners by *Dedimus.* *Stiles Pract' Reg.* 75.

Debt upon Articles. Chaloner *verſus* Davis.

Debt for 100 *l.* and declares, That by Articles of Agreement, 1 *Maii*, 8. *W* 3. between the Plaintiff and Defendant, *Firſt*, It was agreed between the Parties aforeſaid, and the Plaintiff covenanted that he, and all Perſons claiming under him, ſhould make to the Defendant a good and ſufficient Title, Aſſurance, and Conveyance, of certain Lands, upon or before the 17th *Nov.* then next enſuing. *Secondly*, The Defendant covenants with the Plaintiff, that he or his Aſſigns, *tempore executionʼ & ſigillationʼ talʼ* Conveyance, and in Conſideration thereof would well and truly pay, or cauſe to be paid unto the Plaintiff, his Executors, Adminiſtrators, or Aſſigns, the full and juſt Sum of 503 *l.* at the Houſe of Sir *Francis Child*, ſituate, *&c.* and ſome other Articles, both bind themſelves in 100 *l.* for Performance. The Plaintiff avers, he had performed all the Covenants and Articles on his Part, and that the Defendant had not kept the Articles and Covenants on his Part; and particularly the Plaintiff avers, that he and one *Robert Markam*, of, *&c. poſt confectionʼ præd' ſcripti Articulorum præd' & ante præd' 17 Diem Novʼ in eodem ſcripto Articulorum mentionatʼ, ſcilʼ 16 Die eiſdem Menſis Novembʼ (eodem Robertoʼ Markham) poſſeſſionatʼ exiſtenʼ de & in tenementis & præmiſſis præd' pro reſidʼ duorum Terminorum Annorum reverſione inde præfatʼ Willoʼ Chaloner* (*le* Plaintiff,) *& Hæredibus ſuis ſpectanʼ apud* S. *præd' quandam Indenturam ſuam Barganie & venditionis de Tenementis ac præmiſſis præd' in ſcripto Articulo & præd' mentionatʼ fecerʼ & ſigillaverʼ & ut facta ſua Indenturʼ*

Covenant to make Aſſurance.

tur' ill ad uſum ipſius Thomæ Davis adtunc & ibid' deliberavere pro quam quidem Indentur' præd' Willielmus Chaloner & Robertus pro & in conſideratione ſeperal' ſum' 5 s. &c. eiſdem W. C. *& Robert' in manibus reſpective ſolut'* (and ſo recite the Leaſe for a Year,) and then recites the Releaſe dated 17 *Nov.* ſealed and delivered to the Uſe of the ſaid *Thomas Davis*. The ſaid *Tho. Davis* did grant, releaſe and confirm (in Conſideration of 503 *l. bone*, &c. *in manibus mentionat' fore ſolut'*) and the ſaid *R. M.* in Conſideration of 5 *s.* and ſo recites the Releaſe, *&c.* And the Plaintiff avers, that he was then and there ready, and offered *ſemper que poſtea fuit & adhuc paritus exiſtit ad cuſtagia ipſius Thomæ* (*le* Defendant) *facer' & procurare fier' aliquam aliam conveyanciam de Tenementis & Præmiſſis præd' ſecundum formam Articulorum prædict'*: And further avers, that the Defendant *poſtea ſcili' præd' 17 Die Nov. apud S. præd' de Præmiſſis notitiam habuit. Et ſic inde notitiam habens præd'* (*le* Defendant) *Indent' ill' ſe agreeare ſeu ill' de eiſdem W. Chaloner & Roberto ut fact' eorund' W. Chaloner & Robert' præd' Thomæ acceptare adtunc & ibid' penitus recuſavit & adhuc recuſat & præd' ſummam 503 l. eidem W. Chaloner ſecundum formam & effectum ſcript' Articulor', præd' præd' Thoma ſeu Aſſignat' ſui non ſolver' ſeuſolvi cauſaver'. Sed ill' eidem Willo' Chaloner ſolvere ſecundum formam & effectum Articulorum præd', præd' Thomas contradixit & adhuc contradicit per quod Actio accrevit eidem Willo' Chaloner ad exigend' & habend' de præd' Thoma præd' 100 l. præd' tamen Thomas licet ſepius requiſit' &c. ad damnum 20 l. Et inde*, &c.

Demurrer.

Theſe

Theſe Exceptions were taken to this Declaration.

1 *Except.* That the Execution of the Conveyance ought to precede the Payment of the Money; and then if the Plaintiff hath no ſufficiently ſhewed that he had executed ſuch Conveyance, he hath not well entitled himſelf to the Action, and the Execution of the Conveyance ought to precede the Payment of the Money: And it was ſaid by the Defendant's Council, that by the Articles no Day certain was appointed for the Payment of the Money, but this by the Agreement of the Parties was to be reduced to a Certainty by the Act of the Plaintiff, *viz.* the Execution of the Conveyance: By the Articles, the Conveyance was to be made upon or before the 17th of *November* then next enſuing; and, as it ſeeems, if the Plaintiff had executed a Conveyance before this Day, he might have had Action for the Money immediately after, by which it is proved the Duty accrues to the Plaintiff after the Execution of the Conveyance, and not before. If the Covenant had been to convey the Lands on a Day certain, then there had been ſome Colour that the Words, *tempore executionis & in conſideratione inde*, &c. ſhould refer to the ſaid Day, and not to the Execution of the Conveyance; and yet in ſuch Caſe it hath been adjudged, that the Payment of the Money ſhall refer to the Act to be done, as was in the Caſe of *Elwick* and *Cudworth*, 1 *Lut.* and ſo the Caſe of *Shales* and *Seignoret Intr.* 10 *W.* 3. *B. R.* where the Plaintiff covenants with the Defendant to tranſer to the Defendant 400 *l.* in the Bank Stock, and the Defendant covenants that he would accept it, and

Where the Execution of the Conveyance ought to precede the Payment of the Money, or not.

and that he, *tempore translationis inde*, would pay so much to the Plaintiff; and in Action on the Breach of this Covenant the Plaintiff declares, that he had given Notice to the Defendant, that he at such a Day and Place would transfer, *&c.* and appointed the Defendant to be there, *&c.* which he had refused, and the Breach was assigned in the Nonpayment of the Money; but upon Demurrer, Judgment was given for the Defendant, for that it appears by the Plaintiff's own shewing that there was not any Transfer, and so no Money was due: The Opinion of the Court was, that the Execution of the Conveyance was to precede the Payment of the Money.

And as to the Point of pleading the Execution of the Conveyance, it was not well pleaded, for that upon the whole Matter there was a Surrender of the Interest of *Markham* to the Plaintiff, and by Consequence the Lease for a Year was only the Lease of the Plaintiff, and then the Plaintiff ought to have declared upon the Truth of his Case, according to the Operation of Law, upon all the Matter of Fact of the Case, which not being done, the Declaration for this is ill; and these Cases were cited to prove it, 2 *Sand.* 96. *Chester* and *Williams*, *Noy.* 66. *Cook* and *Brombill*, 1 *Mod.* 14. *Hall* and *Seabright*, 7 *Rep.* 24. *b*. *But*'s Case, 2 *Vent.* 149. *Lade* and *Baker*, & 260, 266. And the Opinion of the Court, that for this the Declaration was ill; for it was said, Tenant for Years may not make a Lease within the Statute of Uses, and by this Means to give Possession to the Defendant, to make him capable of a Lease of the Reversion.

2 *Except. to the Declaration.* That by the Article

Articles the Plaintiff was to ſeal and execute to the Defendant and his Aſſigns a good and ſufficient Aſſurance, *&c.* and the Declaration is, That he had ſealed and delivered to the Uſe of the Defendant a Leaſe and Releaſe, which is not a ſufficient Averment of Performance of the Covenant in this Reſpect; for paradventure they were delivered to him who would not deliver them to the Defendant, and the Defendant had not any Means to compel the Delivery to him, becauſe the Plaintiff has not mentioned any Perſon to whom he delivered them; and for this Exception theſe Caſes were cited, *Noy.* 18. *Tanfield* and *Green*, 4 *Leon.* Caſe 48. *Beaſe* and *Drayton*'s Caſe, 3 *Cr.* 143.

Averment of Performance.

3 *Except.* That the Covenant of the Defendant was to pay 103 *l.* to the Plaintiff, or his Aſſigns, and the Declaration is only that he had not paid them to the Plaintiff, but doth not ſay, or his Aſſigns; and the Caſe of *Colt* and *Howes*, 3 *Cr.* 348. *Penſon*'s Caſe, 3 *Keb.* 440. *Abbot* and *Biſhop*'s Caſe, 2 *Sid.* 41. were cited.

4 *Except.* The Covenant is, that the Defendant ſhould pay the Money upon the Execution of the Conveyance, at the Houſe of Sir *Francis Child*, &c. And the Declaration is, That he has not paid *ſecundum formam & effectum Articulorum*, which is not good Pleading: For there being a Time and Place appointed for the Payment, it ought to be alledged, that the Money was not paid at ſuch Time and Place. *Elborough* and *Yates*, 2 *Keb.* 874. was cited as to this Exception, *Vid.* 1 *Lev.* 145. 3 *Lev.* 293. 3 *Cr.* 281. 2 *Mod.* 268. *Lamplugh* and *Sheers*, 1 *Lut. Cro. Car.* 5. *b.* but no Reſolution of the Court was upon theſe three laſt Exceptions. Judgment was given

Payment *ſecundum formam & effectum Articulorum.*

pro

pro Defendant. For the firſt Point, ſee *Thorp* and *Thorp*, 1 *Lut. Chaloner* and *Davis*, 565.

Thorp *verſus* Thorp. *Opinion of Court* per *C. J.* Holt.

Declaration upon mutual Promiſes upon an Agreement, by which the Plaintiff agreed to releaſe the Equity of Redemption in Two Cloſes, in Conſideration whereof the Defendant aſſumed to pay the Plaintiff 7 *l. &c.*

In this Caſe the Agreement was, that the Plaintiff ſhall releaſe the Equity of Redemption, in Conſideration of which the Defendant is to pay 7 *l.* ſo that the making the Releaſe is a Condition Precedent to the Payment of the Money.

There needs no Averment where Covenant is for Covenant.

15 *H.* 7. 10. A good Difference upon the Words of the Agreement; One covenants to ſerve me for a Year, and I covenant to give him 20 *l.* he may ſue for the 20 *l.* altho' he doth not ſerve me; otherwiſe, if the Agreement were, that he ſhall have 20 *l.* to ſerve me for an Year.

There is no Reaſon that one ſhall be compelled to pay Money for Performance of an Act, before the Act be done. But here the Differences enſuing are to be noted:

1. If by the Agreement a Day certain ſhall be appointed for Payment of the Money, and this Day happens before the Act can be performed, there, tho' the Words are, That one ſhall pay ſo much for the Performance of ſuch an Act by the other; yet the Party may have Action for the Money after the Day appointed for the Payment of the

the Money, and before the Act be done, *Vid. Ughtred's* Caſe, 7 *Rep.* 1 *Ventr.* 147. *Larg* and *Cheſhire's* Caſe, 1 *Sand.* 319. It was agreed, that *Pordage* ſhould give to *Cole* 500 *l.* for all his Land, the Money to be paid a Week after *Midſummer:* An Action lies for the Money before the Land is conveyed.

2. If a certain Day be appointed by the Agreement; yet if this Day happen after the Conſideration is to be performed, there ought to be an Averment, that the Service is performed, *Dier* 76. If a Contract be made between Two, that for the Hawk of one to be delivered ſuch a Day, the other ſhall have his Horſe at *Chriſtmas*; if the Hawk is not delivered at the Day, the other ſhall not have Action for the Horſe; *Vid.* 1 *Rol. Abr.* 415. *al' contra.*

I agree, 2 *May*, make an Agreement, one to pay ſo much, and the other to deliver the Horſe if they will; and upon ſuch mutual Promiſes they may have mutual Action, but they may alſo make the Agreement otherwiſe, 2 *Mod.* 33.

Plaintiff declares, That in Conſideration that he promiſed to aſſign his Intereſt in ſuch an Houſe, the Defendant promiſed to pay him ſo much: The Qu. was, Whether the Plaintiff ought to aver that he had aſſigned his Intereſt in the Houſes. And it was ruled, he need not make ſuch Averment upon the Authority of *Ughtred's* Caſe. Judgment *pro Quer'*.

Covenant

Covenant to make further Aſſurance on Requeſt.

Within a Month after Requeſt.

Covenant to make further Aſſurance within one Month, upon Requeſt of the Covenantee: If the Covenantee requeſt him within the Month, and he refuſeth, tho' he be ready after within the Month, yet the Covenant is broken, in as much as the Time of the Month is limited to the Requeſt. *Aliter*, had it been within a Month after the Date of the Deed of Covenant, *H.* 37 *El. B. Perpoint* and *Thimblethorp*.

At all Times hereafter, within the Space of One Month, when he ſhall be required.

The Condition of an Obligation is ſuch; If the Obligor do at all Times hereafter, within the Space of one Month, when he ſhall be required, make ſuch further Act and Acts, Aſſurance and Aſſurances, as the Obligee ſhall by his Council demand, *&c.* then the Bond to be void. In this Caſe, if the Obligee do not demand any further Aſſurance within the Month after the making of the Obligation, yet the Obligor is bound to make further Aſſurance within a Month after Requeſt made, after the Month paſſed after the making the Bond, for that the firſt Words, [to wit, *At all Times hereafter*,] are without Limit, and the other Words [*Within one Month when he ſhall be required*] refer to the Requeſt, *(videlt')* he ſhall have a Month for doing it after Requeſt, for the more favourable Conſtruction ſhall be made to make the Agreement effectual; and it is not like a common Covenant, to make further Aſſurance within Seven Years, for the Uſe in ſuch Caſe has been to interpret it, that he ſhall not be troubled after Seven Years, *Hill.* 1650. *Wentworth* and *Wentworth*, *Intr. Trin.* 1650.

To make further Aſſurance within Seven Years.

Covenant

Covenant is to do any Thing upon Requeſt. The Plaintiff aſſigns for Breach, The Defendant could not be found. After, he made Proclamation at the Church, and in ſeveral Market's giving Notice of the Requeſt; yet this is not any Requeſt, in as much as it ought to be made to his Perſon, *Grimit* and *Pinnell*, *M.* 8 *Car B. R.*

Requeſt ought to be made to the Perſon.

Covenant in Condition of a Bond to convey Land, to make and ſuffer, *&c.* all and every ſuch reaſonable Act and Acts, Thing and Things, whatſoever they be, for the good and lawful aſſuring and ſure making of the Mannor of *S.* to *J. S.* and his Heirs, *&c.* And the Breach aſſigned was, That he requeſted the Defendant, *quod ipſe conveyaret & aſſuraret Manerium de S.* to *J. S.* &c. it's ſufficiently aſſigned, for the Defendant ought to have done this upon Requeſt by Feoffment, or ſome kind of Aſſurance, and if after the Plaintiff requeſt a Fine, the Defendant ought to acknowledge it alſo, and ſo upon every ſeveral Requeſt; but he is not bound to give any Obligation or Recogniſance, which is collateral Security, *Yelv.* 44, 45. *Pudſey* and *Newſham*, *More* 682. 1 *Brownl.* 84. *meſme* Caſe.

Every ſeveral Requeſt.

Not bound to give collateral Security.

Covenant to make farther Aſſurance; If he make Aſſurance on Condition, it is not a Performance, 1 *Rol. Abr.* 425. *Risbon* and *Gair.*

Conditional Aſſurance.

Debt on Bond of Covenants; the Plaintiff ſets forth an Indenture, which purports a Grant of Land by Two Men and their Wives, ſeiſed in Fee in Right of their Wives, Partners to the Plaintiff in Fee; and it was covenanted, that the Plaintiffs and their Wives had good Right to aſſure the Land, and

and to make further Aſſurance upon Requeſt at any Time within Seven Years; and for Breach, that one of the Wives was within Age at the Time of the Aſſurance, and dies, and the Right of the Land deſcended to her Son, an Infant. The Defendant pleads, the Wife was of full Age, and it was found ſhe was within Age: It was moved in Arreſt of Judgment, Here is not any Requeſt ſhewed to make the Aſſurance according to the Covenant, and ſo no Breach aſſigned. And tho' he had Time for Seven Years to make the Requeſt, and the Wife dies within the Seven Years, and the Right deſcended to the Infant, and ſo impoſſible to make a good Aſſurance. *Per Cur'*, the Death of the Wife in the Infancy of the Son was an Act of God, and it was the Fault of the Plaintiff that he did not demand the Aſſurance in the Life of the Wife, and after her full Age; for it appears by the Verdict, that in the 29 *Car.* 2. ſhe was Twenty, and that 32 *Car.* 2. ſhe had Iſſue, and ſo the Breach not well aſſigned. But another Breach was ſhewed, (*viz.*) That the Wife being within Age at the Time of the Covenant, as appears by the Verdict, ſhe had not Power then to convey the Eſtate according to the Covenant, and this was a manifeſt Breach, Sir *Tho. Jones*, 195. *Naſh* and *Aſton*.

The Plaintiff's Fault in not demanding Aſſurance.

To levy a Fine.

One covenants for further Aſſurance to levy a Fine of all his Lands in *D.* which were Four Houſes, and tenders a Fine. Defendant pleads, that at the Time of the Covenant he was only ſeiſed of Two Houſes, and that the other Two deſcended to him afterwards, and good, for he is not bound to levy a Fine of more than he had at the Time of the Co-

venant, for then more would paſs, and is not like to the Caſe where more Acres are comprehended in the Fine, which will be to the Coniſor: So covenant to levy a Fine of Two Acres, and the Fine is of Four Acres by the Name of Two Acres comprehended in the Indenture, it is not good, 1 *Rol. Rep.* 103, 117. *Wilſon* and *Welch*, 2 *Bulſt.* 317.

Covenant to make further Aſſurance, and to do any Act or Acts, *&c.* and ſhews that he demanded of him, and tendered a Note of a Fine, comprehending that he would levy a Fine of Three Meſſuages, *&c.* and that he required him to acknowledge it before a Judge of Aſſize. The Defendant pleads, That in the Note were more comprehended than he intended to aſſure; it's no Plea: For the Reſidue is to the Uſe of the Coniſor, and the Plaintiff need not ſhew that a Writ of Covenant was depending at the Time of the Requeſt, tho' he muſt do that to make a good Fine, *Cr. Jac.* 251. *Boulnes* and *Curtis.*

Covenant to make a Leaſe of ſo many Rooms upon Requeſt, and the Covenantor proſtrated Part; the Plaintiff did not aver in his Count, that he requeſted the Defendant to make him a Leaſe, but it ſeems not to be neceſſary, the Defendant having diſabled himſelf by the Proſtration of the Buildings, 1 *Lut.* 308.

Covenant to make Assurance as Councel shall advise.

Diversity between Assurance and reasonable Assurance.

If *A.* covenant to make such Assurance for the Payment of 100 *l.* to *B.* as his Councel shall devise, and his Councel devise that *A.* shall make an Obligation of 1000 *l.* for the Payment of 100 *l.* he ought to perform it. *Aliter*, if the Covenant had been to make such reasonable Assurance.

That he shall be bound in a Bond that the other shall enjoy: No Assurance.

A Man covenants to make such Assurance as the Councel of the other shall devise; and the Councel adviseth that he shall be bound in a certain Obligation that the other shall occupy the Lands peaceably; he is not bound to perform it, for this is not any Assurance within the Intent of the Covenant. *Per Cur'*, but if a Man be bound to do such Acts for the Assurance of the Mannor of *B.* as the Councel of the other shall devise; and the Councel deviseth that he shall make an Obligation or Statute that the other shall enjoy it, he ought to perform it, otherwise he hath broken his Covenant.

Aliter, if a Man be bound to do such Acts.

If a Man covenant to make such Assurance as the Councel of the Covenantee shall devise, of an Annuity of 30 *l.* and of 200 *l.* in Monies, and the Councel deviseth that he shall make an Obligation, in which he shall oblige himself, his Heirs, and Executors, to pay to the other the Annuity, and also 200 *l.* at certain Days; he is not bound to perform it, for this Obligation is not any Assurance of the Annuity.

Obligation not any Assurance.

As Councel may advise.

Covenant is to make to the Covenantee, or his Assigns, as good a Lease as Councel may advise; and after the Obligee comes to the Obligor,

Obligor, and appoints him to make a Leaſe to *J. S.* he ought to do it, altho' no Councel adviſeth it but the Obligee himſelf; for by the Words it is not neceſſary to have the Advice of Councel, but only that the Leaſe be made ſo good as Councel may adviſe, *Allen* and *Wedgwood*.

If the Condition or Covenant be to make ſuch Aſſurance in Law of certain Lands to the Covenantee or Obligee, as by the Councel of the Covenantee upon Requeſt made ſhall be adviſed; and after *J. S.* was of Councel of the Covenantee, and gives his Advice to the Covenantee, that the Covenantor ſhall make a certain Aſſurance; and the Covenantee gives Notice to the Covenantor of the ſaid Advice, and requires him to perform it; he ought to perform it, for it is more convenient that the Councel ſhall give the Advice to the Covenantee than to the Covenantor, for that the Covenantor doth not know whether he be of Councel in this Matter, for he may be of Councel in one Thing, and not in another, 5 *Rep. Higgenbothom's* Caſe. In Covenant to make further Aſſurance; If the Councel deviſeth an Obligation or Statute for the peaceable Enjoyment, he is not bound to make it; but if the Covenant were to do ſuch Act or Acts for the Aſſurance of *D.* as his Councel ſhall deviſe, and he deviſeth a Statute for the peaceable Enjoyment thereof, he is bound to make Aſſurance as the Plaintiff's Councel ſhall deviſe: It is not ſufficient to plead he made ſuch Aſſurance, but that the Plaintiff's Councel deviſed ſuch Aſſurance which he had made, *Cr. El.* 393. in *Hutchinſon's* Caſe.

Councel to whom to give the Advice.

3 *Mod.* 192.

How to plead.

On Covenant, that before ſuch a Day he would make ſufficient Eſtate of Lands of ſuch Value to the Plaintiff for Life; the Defendant pleads he made an Eſtate in Lands of ſuch a Value, *&c.* he muſt ſhew what Eſtate was adviſed, and what Land, that ſo there may be an Iſſue, 28 *H.* 8. 1. *b.*

One covenants to make further Aſſurance to the Bargainee, as his Councel ſhall adviſe; in this Caſe the Bargainee himſelf, altho' he be learned in the Law, may not deviſe this Aſſurance, but ſome one of his Councel ought to deviſe it; for if the Party himſelf may deviſe it, then it ſhall be no Plea to ſay, *quod Concilium non dedit adviſamentum*, 5 *Rep.* 19. *b.* This Caſe was denied for Law by all the Judges, *Paſche* 13 *Will.* 3. *Cam. B. Walker* contra *Gower.*

Concilium non dedit Adviſamentum.

If one be bound to make to a Man a ſure, ſufficient, and lawful Eſtate in certain Lands, by Advice of *J. D.* if he make an Eſtate to him according to the Advice of *J. D.* be it ſufficient or not, lawful or not lawful, yet he is excuſed of the Obligation, 5 *Rep.* 23. *b.* ſo ſaid in *Lamb*'s Caſe.

By Advice of *J. D.* if *J. D.* adviſe an inſufficient Security, it's a Diſcharge of the Covenant.

Articles of Agreement, whereby the Plaintiff covenanted to make an Aſſurance by a Day of Lands, as the Councel of the Defendant ſhall adviſe, and on perfecting thereof the Defendant is to pay 300 *l.* and 300 *l.* at a Day after. The Defendant pleads, the Plaintiff had not at the Time of the Covenant, or after, any Right or Eſtate. Plaintiff demurs. *Per Twiſden*, he may demur, for tho' the Plaintiff has no Eſtate, yet if he be required to convey, and doth not then do it by the Time, the Covenant is broken, for the Eſtate of the Covenantor may be in Truſt.

Covenant to make Aſſurance, and on the perfecting of it 300 *l.* to be paid. Defendant pleads the Plaintiff had not any Right or Eſtate.

Sed

Sed Cur' contra. This is good in Action by the Defendant for Non-aſſurance; but here the Action is for the Money, and ſo the Defendant hath Election to plead as here, or that he tendered ſpecial Conveyance by Advice, and the Plaintiff refuſed; and the manifeſt Intent of the Parties is not to pay any Money but upon Aſſurance, 1 *Keb.* 734, 756. *Audly* and *Berry*.

If *A.* covenant with *B.* to make ſuch reaſonable Aſſurance to *B.* in Fee of ſuch Land, reſerving to *A.* and his Heirs 20 *s.* Rent *per Annum*, as the Councel of *B.* ſhall adviſe; and after *B.* tenders to *A.* a Deed-Poll, by which *A.* enfeoff'd *B.* of the Land in Fee, reſerving the ſaid Rent to *A.* in Fee: This is not any ſuch reaſonable Aſſurance to bind *A.* to ſeal, for this is a Rent-ſeck, and the Deed belongs to the Feoffee, and then *A.* without the Deed ſhall not have any Remedy for the Rent, for he cannot prove the Feoffment, *Guppage* and *Aſcue*, *Mich.* 11 *Car. B. R.*

Deed-Poll not any Aſſurance of Rent.

A. covenants with *B.* to make and do all ſuch Acts and Deviſes for the better Aſſurance, which ſhall be deviſed by *B.* or his Councel. *B.* deviſeth a Releaſe to be ſealed by *A.* and *C.* his Son, and *A.* preſently ſeals it, but *C.* not being letter'd, nor could read, prays *B.* to deliver it to him, that he might ſhew it to a Man learned in the Law, to inform him if it were according to the Covenant, and if it were according to the Covenant or Condition he would ſeal it; which to do *B.* refuſeth, and *C.* refuſeth to ſeal it: This is a Breach of the Covenant, for that he did not require the Writing to be read to him, and he was bound to take Coniſance of the Law, whether it was according to the

Time to ſhew it, if it were according to the Covenant.

Covenant, and he ſhall not have a reaſonable Time to ſhew it to his Councel, and the Covenant was Peremptory, to be performed at his Peril, *Dier* 338. *a. Wotton* and *Cooke*, 2 *Rep.* 3. *Manſer's* Caſe.

So in *Simms* and *Smith's* Caſe, 1 *Rol. Abr.* 441, 442. If *A.* being Copyholder for Life, covenants with *B.* to ſurrender to *B.* in Reverſion the ſaid Copyhold Tenement, *ſuper rationalem requiſitionem ei fiend' per* B. and after *B.* tender to *A.* a Writing, purporting a Letter of Attorney of Surrender of the ſaid Tenement to *B.* and *A.* requeſts that before they ſeal it, that ſhe by her Councel *circa ſcriptum illud infra rationabile tempus tunc proximum ſequens Adviſaretur*, which *B.* refuſeth, and upon this *A.* refuſeth to ſeal it: Admitting that *A.* was bound to ſeal the Letter of Attorney, and to ſurrender by ſuch Letter of Attorney, then ſhe had broken her Covenant, for ſhe ought to take Coniſance of the Law at her Peril, whether the Letter of Attorney be according to her Covenant, and ſhall not have any Time to be adviſed upon it; but the reaſonable Time mentioned in the Covenant, intends reaſonable Time in the doing it, (*viz.*) ſhe ſhall have Time to read it before ſhe ſeals it.

Reaſonable Time.

Covenant to make ſuch Aſſurance as Councel ſhall deviſe; they ſay, they tender'd a Leaſe and Releaſe deviſed by Councel, and ſets it forth with the uſual Covenants, and with a Warranty: Uſual Covenants may be put in, but not a Warranty, 1 *Mod.* 67. *Laſſels* and *Catterton*, Vid. 2 *Keb.* 685. *Raym.* 190.

Uſual Covenants may be put in.

A Cove-

A Covenant to make ſuch Aſſurance for the Payment of 100 *l.* to *B.* as his Councel ſhall deviſe, and his Councel deviſeth that *A.* ſhall make an Obligation of 1000 *l.* for the Payment of 100 *l.* he ought to perform it, otherwiſe had it been to make ſuch reaſonable Aſſurance as the Councel of the Covenantee ſhall deviſe, 1 *Rol. Abr.* 423.

Covenant to make ſuch Aſſurance as Councel of, *&c.* ſhall deviſe, and the Defendant by Advice of Councel demandeth a Releaſe with Warranty. *Per Cur'*, this is not any Aſſurance, but a Means to recover in Value, 2 *Leon.* 130. *Wye* and *Thoroughgood.*

A Releaſe with Warranty no Aſſurance.

A Covenant to make ſuch Eſtate to the Plaintiff as his Councel ſhall adviſe, and ſaith *Concilium non dedit Adviſamentum*: It was a *Quere*, whether he ought not to ſay, *Concilium nullum dedit Adviſamentum*, but now it's ſettled a good Plea, 11 *H.* 7. 23. *a.* 6 *H.* 7. 4. and need not alledge what Perſons were of his Councel, and that they gave no Advice, for the Plea is in the Negative; but if he plead his Councel gave to him ſuch Advice, he ought to plead what Perſons were of his Councel; then the Replication was, that *J. W.* was of the Plaintiff's Councel, and no more, and he gave ſuch Advice, *&c.* which Adviſement the Plaintiff notified to the Defendant: Iſſue on the Advice, 6 *H.* 7. 4.

Concilium non dedit Adviſamentum.

One covenants to make ſuch Aſſurance as the Plaintiff's Councel ſhall adviſe, and he pleads Performance of Covenants, he cannot afterwards ſay, *Concilium non dedit Adviſamentum*, in *Specot* and *Sheer's* Caſe, Cr. El. 828.

Concilium non dedit Adviſamentum.

If I am bound to make you ſuch Aſſurance as *J. S.* ſhall deviſe, I am bound at my Peril to procure Notice; but if I am bounden to make ſuch Aſſurance as your Councel ſhall deviſe, there Notice ought to be given to me, 1 *Leon.* 105. *Raſ.* 141. in *Atkinſon's* Caſe.

Notice.

W. covenants for himſelf, his Heirs, Executors, Adminiſtrators and Aſſigns, within Seven Years, upon Requeſt to convey to the Plaintiff a Copyhold Eſtate: *W.* dies, a Requeſt muſt be made to his Executors. Tho' *W.* was ſeiſed in Fee, the Executors are bound to ſee it done; 2 *Bulſt.* 158. *Thurſden's* Caſe.

Requeſt.

Covenant to convey certain Lands in *B.* to the Plaintiff, by ſuch Conveyance as the Plaintiff's Councel ſhould adviſe; and the Plaintiff by Advice of his Councel did tender a Leaſe and Releaſe *in hæc verba*, which Releaſe contained ſeveral Covenants, amongſt which one was againſt a Stranger, and a Warranty, and the Defendant refuſed to ſeal it. *Per Cur'*, there ought not to be a Covenant againſt a Stranger, nor Warranty, *Raym.* 190. 1 *Sid.* 467. 1 *Mod.* 67. 2 *Keeble* 685. *Laſſels* and *Challerton.*

Covenant to make an Aſſurance, and on perfecting thereof the Defendant is to pay 300 *l.* Covenant is brought for the Money. Defendant pleads, the Plaintiff had no Eſtate which he could convey: The Plea is good, if no Aſſurance, nothing is to be paid, altho' the Plaintiff averred he was ready to perfect it, and that the Defendant never tendered any, nor hath paid; here the Action is for the Money, and the Defendant hath Election to plead as here, or that he tendered a ſpecial

a ſpecial Conveyance by Advice, and the Plaintiff refuſed. Judgment *pro* Defendant, 1 *Keb.* 734, 756. *Audley* and *Berry*.

Covenant that if the Defendant would pay 40 *l.* he would convey as the Councel of the Plaintiff ſhould adviſe. In Action of Covenant for the Money, Defendant pleads the Plaintiff did not convey as Councel did adviſe, which *per Cur'* is ill, without particular ſhewing the Manner, and what the Councel did adviſe, 1 *Keb.* 178. *Haines* and *Baily*.

In Action of Covenant, which was to make ſuch an Aſſignment to the Plaintiff, according to an Agreement made between him and the Defendant as Councel ſhould adviſe. The Queſtion was, If the Plaintiff or Defendant's Councel ſhall give the Advice? It ſeems his Councel ſhall adviſe to whom the Covenant is to be made, 1 *Bulſt.* 160.

At whoſe Coſts.

That the Covenantor at the Coſts of the Covenantee would aſſure ſuch Lands before ſuch a Day; the Covenantor is to make the Aſſurance what he pleaſeth, and ought to give Notice what Aſſurance he will make, and his Readineſs that the other may know what Coſts he is to tender, *Cr. El.* 517. *Halling* and *Connard*. The Covenantor ought to do the firſt Act, *(viz.)* notifie to the Covenantee what Eſtate he will make, ſo that the Covenantee may know what Sum to tender; and it is all one, whether the Covenant is general or particular, as to make a Feoffment, *&c.* *Moo.* 457. & 5 *Rep.* 22. *b.* *meſme* Caſe.

If

Aſſurance to be made by Parcells, if required.

If the Aſſurances are to be made at the Coſts of him to whom they ought to be made, he may require the Aſſurance to be made by Parcels. *Aliter*, when the Covenantor is to be at the Charges: Yet there, if the Party require an Aſſurance of Parcel, the Covenantor muſt do it, but then he is diſcharged from making any Aſſurance of that which remains, *Crok. El.* 681. *Waſhington's* Caſe.

Plea, That the Plaintiff did not tender the Coſts.

A Condition or Covenant to make a ſufficient Leaſe to the Obligee or Covenantee before ſuch a Day, the ſame to be made at the Coſts of the Obligee: It is a good Plea, that the Plaintiff did not tender the Coſts to him, and if then, that he was ready, *More* N°. 72. Q. *ceſt Liver.*

A Covenant that the Vendor ſhall make further Aſſurance at the Coſts and Charges of the Purchaſer; it was alledged for Breach, that a Note of a Fine was deviſed and ingroſſed in Parchment, and delivered to the Vendor to acknowledge the Fine at the Aſſizes, which he refuſed to do. And the Plaintiff's Breach was demurred upon, becauſe he did not offer Coſts to the Vendor; and *per Cur'*, it's ill, 1 *Brownl.* 70. *Preſton* and *Dawſon.*

Pleadings. Vide ſupra Sparſim.

Condition of a Bond was, That if the Plaintiff ſhall ſeal to the Defendant a good and ſufficient Conveyance in the Law of his Lands in *Jamaica*, with uſual Covenants, as by the Defendant's Councel ſhall be adviſed, then if the Defendant ſhould thereupon pay, *&c.* after *Oyer* of the Condition. The Defendant pleads, that Mr. *W.* a Councellor at Law, did adviſe a Deed of Bargain and Sale from the Plaintiff to the Defendant, with the uſual Covenants of all his Lands in *Jamaica*, and tendered the Conveyance to the Plaintiff, who refuſed to ſeal the ſame. Plaintiff demurs.

1. Becauſe the Defendant hath not ſhewed the Conveyance, and an affirmative Plea ought to be particular: As to plead generally *Exoneravit*, is not good, but it muſt be ſhewed how, *Cr.* 2. 165, 359, 363. 1 *Sid.* 106. *Cr. Car.* 383. 2 *Leon.* 214.

2. The Matter of the Condition conſiſts of Law and Fact, and both ought to be ſet out. The preparing of the Deed is Matter of Fact, and the Reaſonableneſs and Validity thereof is Matter in Law, and the Court muſt judge of it.

3. The Plea is, That the Indenture had the uſual Covenants, but doth not ſet them forth.

But *per Cur'* the Plea is good. For if the Defendant had ſet forth the whole Deed *Verbatim*, yet becauſe the Lands are in *Jamaica*, and the Covenants are intended ſuch as are uſual there, the Court cannot judge of them, but they muſt be tried by the Jury. He hath ſet forth, the Conveyance was by Deed of Bargain

Of Lands in *Jamaica*.

Bargain and Sale, which is well enough, and ſo if it had been by Grants, for Lands in *Jamaica* paſs by Grant, and need no Livery and Seiſin. If any Covenants were unreaſonable and not uſual, they are to be ſhewed on the other Side. Judgment *pro* Defendant, 2 *Mod.* 239, 240. *Goff* and *Elkin.*

If any Covenants be unreaſonable, to be ſhewed on the other Side.

CHAP. XXIII.

Covenant to levy a Fine, or upon further Aſſurance.

IF one do covenant generally to levy a Fine of Lands, he is not bound thereby to go before Commiſſioners by *Dedimus*, *Stiles Pract. Reg.* 75.

The Covenant was, That *J. S.* who is a Stranger, ſhall levy a Fine to the Covenantee, the Covenantee is bound to ſue out a Writ of Covenant, *i. e.* to do the firſt Act. *Aliter*, if I covenant with you that *J. S.* ſhall levy a Fine to *J. N. Winch. p.* 30. *Hill* and *Waldron.*

Who to ſue out the Writ of Covenant.

Covenant is, That the Covenantor ſhall levy a Fine to the Covenantee, the Covenantee ought to do the firſt Act, *i. e.* to ſue a Writ of Covenant, 5 *Rep.* 127. *a.* in *Palmer's* Caſe, *meſme li.* 22. *b.*

The Condition was, That *J. S.* ſhall levy a Fine to the Covenantee before ſuch a Day. Defendant pleads, the Covenantee had not ſued forth a Writ of Covenant. Plaintiff replies, that before the Covenant made *J. S.* had made a Feoffment to *J. D.* of the Land, and the Feoffee was in Poſſeſſion at that Time.

Time. Here the Covenantee need not ſue out a Writ of Covenant, for by the Feoffment *J. S.* had diſabled himſelf. Q. *Winch.* 30. *Eill* and *Waldron.* Diſability.

One covenants for further Aſſurance to levy a Fine of all his Lands in *D.* which was Four Houſes, and tenders a Fine. The Defendant pleads, at the Time of the Covenant he was only ſeiſed of Two Houſes, and that the other Two deſcended to him afterwards, and good. A Covenant to levy a Fine of Two Acres, and the Fine is of Four Acres by the Name of Two Acres, comprehended in the Indenture, it is not good, 1 *Rol. Rep.* 103. *Wilſon* and *Welſh*, 2 *Bulſt.* 317. 1 *Rol. Abr.* 425. Of Four Acres by the Name of Two Acres.

A Covenant to make further Aſſurance, and to do any Act or Acts, *&c.* and ſhews he demanded of him, and tendered a Note of a Fine, comprehending that he would levy a Fine of Three Meſſuages, *&c.* and that he required him to acknowledge it before a Judge of Aſſize. The Defendant pleaded, in the Note there were more compriſed than he intended to aſſure: It's no Plea, *Cr. Jac.* 251. *Boulney* and *Curtes.* If one be bound to levy a Fine to another, he is not bound to ſue forth the Writ of Covenant, but he who is to have Advantage of the Fine is to do it. And in the Caſe aforeſaid, he ought to levy a Fine upon this Note, notwithſtanding there was no Writ of Covenant then hanging; and in the ſaid Caſe, tho' the Note contained more Acres than the Two-Yard Lands, it is good, 1 *Bulſt.* 90. *Vid.* Caſes. Defendant pleads, in the Note there were more compriſed than was intended. Who to ſue forth the Writ.

If

If one covenant generally to levy a Fine of certain Lands, the Covenantor is not bound to go before Commiſſioners authorized by a *Dedimus* to take the Fine to acknowledge his Conſent, for it ſhall be intended he is to do it the ordinary Way, which is not before the Commiſſioners, *Tr.* 22 *Car. B. R.*

Alſo upon a Covenant to levy a Fine, the Party muſt bring his Writ of Covenant, *Et Precipe & Concord'*, and tender it to the Covenantor, before an Action of Covenant will lie for refuſing to do it.

On a Covenant for farther Aſſurance, the Breach of Advice and Requeſt by ſuch a Councel, and ſhews a *Dedimus poteſtatem* to *A.* and to receive the Coniſance, and the Covenantor being requeſted, refuſeth. Tho' he ſhew not any Writ of Covenant was depending, or that the Writ was delivered to the Commiſſioners, and tho' the Fine was with Warranty; yet becauſe the Covenant is not to levy a Fine, but to do ſuch Acts as ſhall be required, Judgment *pro Quer'*, *Latch. p.*186. *Tindal's* Caſe.

Levying a Fine for further Aſſurance.

A Covenant that the Vendor ſhall make further Aſſurance at the Coſts and Charges of the Purchaſer; It was alledged for Breach, that a Note of a Fine was deviſed and ingroſſed in Parchment, and delivered to the Vendor to acknowledge the Fine at the Aſſizes, which he refuſed to do. And the Plaintiff's Breach was demurred upon, becauſe he did not offer Coſts to the Vendor, and *per Cur'* it's ill, 1 *Brownl.* 70. *Preſton* and *Dawſon.*

Offered a Note of a Fine, but no Coſts.

A Con-

A Condition to levy a Fine, not ſaying to whom, at the Coſts of the Obligor; the Defendant pleads no Fine was levied by the Wife of the Plaintiff according to the Condition. Plaintiff demurr'd, on 5 *Rep. Palmer's* Caſe, and *Hull.* 48. *Waldron* and *Hill*, becauſe it is not averred that the Defendant brought any Writ of Covenant, *ſed non Allocat'*. For *per Cur'*, the Law is now changed, and the Fine levied before any Writ entered, and therefore muſt be done by the Plaintiff without any Writ, 1 *Keb.* 816. *Culpeper* and *Auſtin.*

Fine to be levied without any Writ of Covenant.

A Condition that ſuch a Woman ſhould make ſuch farther reaſonable Aſſurance to *J. D.* as *J. D.* ſhould deviſe. *J. D.* levied a Fine, and required her to come before the Judge of Aſſize to acknowledge; ſhe came, and the Judge refuſed her as *non compos mentis*. *Per Cur'*, the Condition was not broken, becauſe it is to make a reaſonable Aſſurance. *Aliter'*, if the Words had been ſpecial to acknowledge a Fine, 1 *Leon.* 304. *Pet* and *Callis.*

Diverſity to make reaſonable Aſſurance, and a ſpecial Covenant to acknowledge a Fine.

Condition that he and his Wife would levy a Fine upon reaſonable Requeſt of the Obligee; he made the Requeſt, the Wife being very ſick, ſo as ſhe could not travel; reſolved her Sickneſs ſaved the Obligation from Forfeiture, *More* N°. 256.

Sickneſs.

A Covenant that Baron and Feme being Leſſees for Life ſhould levy a Fine to a Stranger, at the Coſts of the Stranger; and alſo that they ſhould levy a Fine of other Lands to a Stranger at their Charge. The Covenantor ſaith, the Baron and Feme did offer to levy the Fine if the Stanger would bear the Charges. Plaintiff demurs, and Judgment *pro Quer'*, becauſe the levying of the

the ſecond Fine had no Reference to the other, for [*and alſo*] makes them Two Diſtinct Sentences.

[*And alſo.*]

Pleadings.

Bond for Performance of Covenants; one was to marry *S.* the Daughter: Another, That Sir *E. S.* and his Wife ſhould levy a Fine of ſuch Lands to the Defendant, and to the Plaintiff's Daughter *S.* and to the Heirs of their Bodies. 3. That the Inheritance of the Premiſſes ſhould remain in the ſaid Sir *E. S.* or himſelf until the Fine levied. 4. Whereas he had granted a Leaſe for Years to *S.* the Plaintiff's Daughter, that he had not made any former Grant, nor would make any Grant thereof without the Plaintiff's Aſſent. The Defendant *quoad* the laſt Covenant in the Negative pleads, That he had not made any former Grant of the Leaſe, nor had made any Grant after the Obligation, without the Plaintiff's Aſſent. Et *quoad omnes alias conventiones*, that he had performed them. Plaintiff demurs.

The Performance of Acts on Reward ought to be ſhewed ſpecially.

1. Becauſe the Covenant to levy a Fine is an Act to be performed by a Stranger, and it is an Act to be performed on Record, in both which Caſes he ought to plead how he had performed it; and it is not ſufficient to plead general Performance, for Acts of Record ought to be ſhewed ſpecially, and the Anſwer to them is only *null tiell* Record, and no other Iſſue can be taken.

In disjunctive Covenants he ought to ſhew which of them performed.

2. Becauſe the Covenant being in the Disjunctive, he ought to ſhew ſpecially which of them, and not generally.

3. H

3. He pleads he did not grant without the Plaintiff's Aſſent, which is a Negative Pregnant, and ſo not good, and all allowed *per Curiam*, Cr. *Jac.* 559. *Lee* and *Luthrel*, 2 *Rol. Rep.* 159. *meſme* Caſe. Negative Pregnant.

CHAP. XXIV.

Covenant to account.

A Condition recited; The Defendant ſerved the Plaintiff as Clerk to a Brewer, and that if he performed ſuch Covenants, *&c.* The Defendant pleaded, *performavit omnia.* Plaintiff replies, one Covenant was to give the Plaintiff a true Account of all ſuch Monies as the Defendant ſhould receive when requeſted, and alledgeth that 30 *l.* came to his Hands, and he requeſted, and he refuſed. The Defendant rejoins, and confeſſeth the Receipt; but ſaith, that before the Requeſt made by the Plaintiff he laid it up in the Plaintiff's Warehouſe, and that certain Malefactors (to the Defendant unknown) ſtole it away, *Et hoc paratus*, &c. Plaintiff demurs generally. Defendant pleads he was robbed, and ſo could give no Account.

1. Becauſe it's a Departure.

2. He ought to have concluded to the Country. Plaintiff alledgeth, the Defendant received 30 *l.* and gave no Account. Defendant in his Rejoinder ſets forth he did give Account, and there was an Iſſue, both were over-ruled.

1. It is no Departure, but a Fortification of the Bar; for ſhewing that he was robbed, is giving an Account.

2. The Concluſion is proper, becauſe the Defendant alledgeth new Matter, and therefore ought to give the Plaintiff Liberty to come in with a Rejoinder; he doth not ſay he gave an Account, but ſetteth forth the ſpecial Matter how, 1 *Ventr.* 121. *Vere* and *Smith*, 2 *Lev.* 5. *meſme* Caſe.

One poſſeſs'd of a Term of Six Years of a Tavern, leaſed the ſame to another for Three Years; and it was covenanted between them, that during the Three Years, *quolibet Menſe*, monthly the Leſſee ſhould give an Account to the Leſſor of the Wine that he ſold, and ſhould pay to him ſo much for every Tun ſold. Leſſor grants the Three Years which were remaining of the Six Years to another, and he requeſted the Leſſee to Account, and he would not, and ſo brought Covenant. Defendant pleaded he had accounted to the Aſſignee of the Three Years. Plaintiff demurs. It's no Plea, becauſe it is not a Covenant which did go with the Land, or the Reverſion, but was a collateral Thing, and did not paſs by the Aſſignment of the Three Years, *Godb.* 120. *More* 243. *Vide* this Caſe *infra*, reported more full in *Crok. El. Gallies* and *Budbury*.

Covenant collateral.

Debt by a Brewer, on a Bond to perform Articles againſt his Clerk: One was, That the Defendant ſhould deliver ſuch Ale and Bear weekly as ſhould be delivered unto him to ſuch Cuſtomers as he had in his Charge, and to receive the Monies due for the ſame, and ſhould accompt with the Plaintiff every *Saturday* weekly for ſuch Money he ſhould receive: For Breach, the Plaintiff aſſigns, That the Defendant did not account with him for ſuch Monies as he had received on

Saturday the 25th, *&c.* Verdict *pro Quer'*. Judgment was arreſted: For the Breach was uncertainly alledged, becauſe the Plaintiff doth not ſhew the Defendant had any Cuſtomers in his Charge, or who they were, or that he had delivered Ale or Beer to them, or received any Money of them, *Stiles p.* 473, & 476. *Arnold* and *Lloyd*.

A Breach uncertainly alledged.

Covenant and declares to pay ſo much out of the Profits of an Office, which ſhall be clear beyond ſuch a Sum: The Declaration ſhews not the Place of Account, nor the Sum clear. It's ill, *Sid.* 304. *Bucknal's* Caſe, 2 *Keeble* 92. *meſme* Caſe.

The Place of Account not ſhewed.

Covenant in Writing ſealed, by which the Defendant-Teſtator acknowledged himſelf to be accountable to the Plaintiff for all ſuch Money that ſhall be charged by him upon *A.* to be paid to *B.* and ſaith he charged ſo much upon *A.* to be paid to *B.* and that he had not paid it, for which he brought this Action againſt his Executors; Covenant well lies, tho', *Cr. Car.* 128. *Geary* and *Reaſon's* Caſe was cited to the contrary, and ſo it will lie upon Words in a Deed purporting an Agreement for Payment of Money. It was moved there is not any Notice given what the Money was, and that this was not paid over; but *per Cur'*, he having taken it upon him, and the Perſon being certain, ſo that he might inform himſelf, and the the Agreement not being to pay it upon Notice, the Defendant is bound to take Notice himſelf: And Judgment *pro Quer'*, 1 *Lev.* 47. *Brice* verſus *Car* & al'.

Covenant lies on a Writing, by which the Defendant covenants to be accountable for 100 *l.*

No Notice of a Thing to be done by a Perſon certain, who had taken upon him to do it.

Upon a Special Agreement that the Plaintiff ſhall enjoy and receive the Profits and Salary of an Office during Life; upon Co-

That the Plaintiff ſhall receive the Salary.

venant brought, the Defendant pleaded, That he ſuffered the Plaintiff to enjoy and receive the Profits, *&c.* And *per Cur'*, its good, for it's not a perſonal Warranty or Engagement to pay the Salary. The Defendant is not bound by this Agreement to pay the Money, but only reſtrained from intermedling with the Profits and Salary, 4 *Mod.* 43. *Sawyer* and *Killigrew*.

The Plaintiff being poſſeſs'd of a Term for Six Years of a Tavern in *Gracechurch-ſtreet*, let the ſame by Indenture, with Plate and divers Utenſils in the Houſe, to the Defendant for Three Years. The Defendant in Conſideration thereof covenanted with him and his Aſſigns, That *de menſe in menſem menſatim*, he would upon Requeſt render to him and his Aſſigns, an Account for every Tun of Wine he did ſell there, and pay him for every Tun ſold 30 *s.* And there were divers other Covenants on his Part, (ſome in the Affirmative, and ſome in the Negative;) he pleaded Covenants performed (which was ill in that). The Plaintiff replieth, That upon the laſt Day of *July* he required the Defendant to give him an Account of a Tun of Wine ſold at ſuch a Time, which he refuſed to do. The Defendant rejoined, That before that Time the Plaintiff being poſſeſs'd of a Term in the Tavern for divers Years, Part whereof were yet to come, (but ſhews not what Time in certain, nor the Commencement of it, and therefore it was agreed by all it was ill in that;) granted the Reſidue of the ſaid Term then to come to *B.* to which Grant he attorned, after which Time he did not refuſe. Plaintiff demurs. This is a Rent reſerved, and in nature and lieu of the Rent, but

but the Requeſt of an Account was to be within the Month; and this Requeſt, as appears by Computation, was the Day after the Month which the Secondary certified, and for that Cauſe Judgment againſt the Plaintiff, *Cr. El.* 62. *Gallies* and *Budbury*.

To account monthly upon Requeſt, and the Requeſt was the Day after the Month.

The Covenantor, who was Bailiff of a Mannor of the Covenantee, covenants to render a juſt Account before ſuch a Day of all the Rents of the Mannor which he hath received; he pleads to Action againſt him, that before the ſaid Day he had made an Account of all the Rents which he had received, and becauſe he did not ſhew what Sums he received, the Plea was ill, *Sanders* and *Maleverer*'s Caſe cited, *Cr. El.* 749. in *Mints* and *Bethil*'s Caſe.

He made an Account of all the Rents, but ſaith not what Sums.

Bond to pay 40 *l.* when an Account ſhall be ſtated: The Caſe was, Debt on Bond, wherein the Teſtator did acknowledge himſelf to be indebted in 40 *l.* to the Plaintiff, which he did covenant to pay when ſuch a Bill of Coſts ſhould be ſettled by Two Attornies, indifferently to be choſen. *Per Cur'*, it is not *a Solvend'*, but *a Covenant*, which did not take away the Duty aſcertained by the Obligation; and if it ſhould not be a Covenant, but an entire Bond, then it would be in the Power of the Obligor, whether ever it ſhould be payable. And the Plaintiff having named an Attorney, ought to recover, 2 *Mod.* 266. Sir *J. Ottway* verſus *Holdins*.

Not *a Solvend'*, but *a Covenant*.

In Action of Covenant the Plaintiff declared, that where it was covenanted between the Plaintiff and Defendant, that each of them upon Requeſt ſhould be accountable to the other for all the Corn growing upon

ſuch a Place, and that upon ſuch Account the one of them ſhould deliver to the other the Moiety of the Corn, or the Profit of it. And whereas the Defendant had taken all the ſaid Corn, (*ſcilt'*) Twenty Loads of Wheat, *&c.* growing upon the ſaid Land, and had been required to render Account of the ſaid Corn, which he refuſed to do: The Defendant traverſed the Requeſt, and it was demurred to. It was moved, that the Traverſe was not good; but the Defendant ought to ſay, that the Plaintiff did not require him, *modo & forma*, but the Exception was not allowed; but *per Cur'*, the Traverſe was held good, 2 *Leon.* 5. *Nevill* and *Cook*.

Traverſe.

To give Account of all ſuch Monies as ſhould come to his Hands.

Debt on Bond or Covenant, to give an Account of all ſuch Monies which ſhould come to his Hands, and to pay them to the Plaintiff. Defendant pleads, no Monies came to his Hands. Plaintiff replies, ſuch a Sum came to his Hands. Defendant demurs. *Per Cur'*, the Repiication is ill, in not mentioning that he refuſed to come to Account, and that Breach ought to be aſſigned, 1 *Lev.* 226. *Hegman* and *Gerrard*, 1 *Sid.* 340. 1 *Sand.* 102. *meſme* Caſe.

Pleaded he had laid out 800 *l.* in Reparations, and ſaith not he had accounted.

In Action of Covenant to account for Money received during the Lunacy of Sir *B. Wray*; The Plaintiff ſheweth there was 800 *l.* received, and ſaith not during the Lunacy, which *per Cur'*, is ill, *præter Windham*, who conceived this ought to be ſhewed by the Defendant in diſcharge. It's ſaid, the Defendant had laid out the 800 *l.* in Reparations of Fences, and doth not ſhew he had accounted, which *per Cur'*, he ought to do. And it's no Plea to ſay the Plaintiff did not aſſign Auditors, as it is in Account againſt a Bayliff.

Bayliff. Judgment *pro Quer'*, as to this Breach upon the Want of Account, 2 *Keb.* 145. *Barker* verſus *Thorrald*, 2 *Sand.* 47. *meſme* Caſe.

A. and *B.* are Executors of *C.* *A.* alone covenants with *N.* that if *N.* marry the Daughter of *C.* it ſhould be lawful for *N.* to view and ſearch all ſuch Accounts as concerned the Eſtate of *C.* payable to that Daughter. *N.* marries her, and after *N.* requeſted *A.* and alſo *B.* the other Executor, who had thoſe Accounts to view the ſame: *B.* refuſeth to ſhew them; by this *A.* hath broken his Covenant, for thereby in Law *A.* undertook that any Perſon that had ſuch Accounts ſhould ſuffer *N.* to view and ſearch them, 1 *Rol. Abr.* 431.

CHAP. XXV.

Covenant that the Land ſhall be of ſuch a Value.

IF a Man let Lands for Years, and covenants with the Leſſee, That he ſhall enjoy it without any lawful Interruption by the Leſſor, or any claiming under him; and alſo covenants, That the Land ſhall remain and continue to the Leſſee and his Aſſigns, of the clear Yearly Value of 20 *l.* over all Repriſes during the Term, and after the Leſſor enters upon the Leſſee and ouſts him tortiouſly, and takes the Profits for divers Years, ſo that this doth not continue to the Leſſee of any Value, for the Leſſor took the Profits: He had broken his Covenant, for the Leſſee may have Action for the Interruption on the other Covenant; yet by Special Words he had covenanted, That the Land ſhall continue to the Leſſee of ſuch a Value, and it ſhall not be intended that the Covenant was made to the Intent to warrant it to be of this Yearly Value generally, and not to the Leſſee, when it is expreſly covenanted that it ſhall continue to the Leſſee of this Value. 1 *Rol. Abr.* 429. *Cave* and *Brooksby.*

Entry, and taking the Profits, a Breach of this Covenant.

R. covenants, That the Lands conveyed to the Wife for her Jointure, are of the Yearly Value of 100 *l.* and ſo ſhall continue, notwithſtanding any Act done, or to be done, by him; Action is brought, for that the Land was not of the Yearly Value of 100 *l.* Adjudged againſt the Plaintiff, for theſe Words [notwithſtanding any Act] extends

Notwithſtanding any Act, *&c.*

tends, as well to the Time of the Covenant made, as to the Time future; and though they were not then of that Value, the Covenant was not then broken, except ſome Act done by him were the Cauſe of it. *Cro. Eliz.* 43. Lady *Rich*'s Caſe. 1 *Anderſon* 134. *id. Caſus.*

One covenants, That he was ſeiſed of the Mannor at the Date of the ſaid Indenture, of a lawful Eſtate in Fee, notwithſtanding any Act done by him or any of his Anceſtors, and that no Reverſion or Remainder was then in the King, or any other; and that the ſaid Mannor was then of the Yearly Value of 300 *l.* and that the Plaintiff and his Heirs ſhall enjoy it, according to the Limitations diſcharged of all Incumbrances made by him, or any of his Anceſtors. *Per Cur'*, The Covenant for the Yearly Value is an abſolute and diſtinct Covenant of it ſelf, and hath no Dependance on the firſt Part of the Covenant, That notwithſtanding any Act, *&c. Cro. Car.* 107. Sir *William Crayford*'s Caſe. *Lit. Rep.* 80. *id. Caſus. Vide* 3 *Lev.* 46. 1 *Sand.* 59, 60.

The Covenant for the Yearly Value an abſolute and diſtinct Covenant.

Covenant to aſſure the Mannor of *D.* being of the Value of 100 *l. per Annum*; adjudged, That if he fail in the Matter, or in the Value, it is a Breach, as well as if it had been in ſeveral Covenants. *Lit. Rep.* 204.

A. lets Land to *B.* rendering Rent, *B.* covenants to bear all Charges and Taxes whatſoever, and to diſcharge *A.* of them; after which an Ordinance of Parliament is made, That the Leſſees ſhall deduct their Taxes for the Monthly Aſſeſſment out of the Leſſor's Rents; decreed in *Chancery*, that *B.* in the ſaid Caſe ſhall make Deduction out of the Rent.

In

In *Cancell'*, 19 *June*. *Tr.* 24 *Car.* 1. in *Wright* and *Dixwell*'s Caſe.

In 15 *Eliz. B. C.* a Caſe was moved to the Juſtices by Serjeant *Lovelace*. A Man covenants with another to make and execute an Eſtate of ſuch Lands as ſhould diſcend to him from his Father and Grandfather by a certain Day, the ſame Lands to be of the clear Yearly Value of 40 Marks: The Queſtion was, If the Party had more Lands which came to him from his Grandfather and Father than did amount to the Yearly Value of 40 Marks? If he was to make Aſſurance of all the Lands, or of ſo much thereof only as amounted to the Value of 40 Marks? *Per Manwood*, C. J. he ſhall make of Lands only which were of the Value of 40 Marks *per Annum*, for the Words [ſuch which] do not go ſo largely as if he had ſaid, All my Lands which ſhall diſcend, or to me be diſcended; for then the Yearly Value were but a Demonſtration, and all his Lands ought to be aſſured. 3 *Leon.* 27.

Covenant to pay Taxes.

On Biſhops Leaſe.

Plaintiff declares, That the Defendant's Predeceſſor, Biſhop of *Salisbury*, being ſeized in Fee, let to the Plaintiff certain Lands for 21 Years, reſerving the ancient Rent, and covenanted for him and his Succeſſors to diſcharge all Publick Taxes upon the Land; and that the Defendant ſince was made Biſhop, and a Tax was aſſeſs'd by Parliament, and he refuſed to pay it.

Q. Whether this is ſuch a Covenant as ſhall bind the Succeſſor as incident to a Leaſe, which the Biſhop is empowered to make

make by the Statute of 32 *H.* 8. If it ſhould now be taken, that every Covenant ſhould bind the Succeſſor, the Stat. 1 *Eliz.* ſhould be of none Effect. By *Hale*, admitting this was an ancient Covenant, (and ſo it ſhould have been averred to have been uſed in former Leaſes) to diſcharge ordinary Payments, as Penſions or Tenths granted by the Clergy, then it might bind the Succeſſor, by 32 *H.* 8. but it were very hard to extend it to new Charges: However, this Covenant ſhould prove it would not avoid the Leaſe, but the Declaration being inſufficient, they did not reſolve it fully; for he ſaith the Predeceſſor was ſeized, but ſaith not *in jure Epiſcopatus*, for he might be ſeized in his natural Capacity. 1 *Vent.* 223. *Davenant* verſus Biſhop of *Salisbury*. 2 *Lev.* 68. *Meſme* Caſe.

Leſſee covenanted with the Leſſor to pay all Charges, Dues and Duties to be paid, for or by Reaſon of the Land, and to diſcharge the Leſſor of them; after this, in 18 *Car.* 1. the Act of Parliament for the 400000 *l.* is made; which ſaith, That the Leſſors ſhall be charged for their Rent to the ſaid Tax. If this Act of Parliament diſcharged the Covenant? was propoſed to Mr. *Hales*, and Serjeant *Rolls*, to have their Opinions under their Hands, which they did in this manner: Mr. *Hales* wrote, No; 1. Becauſe the Act did not intend to diſcharge this Covenant, for if it had intended ſo, then it would have ſaid, That all Covenants ſhall be void, as in the Stat. 39 *Eliz. cap.* 2. of converting Arable Land into Paſture, and Stat. 14 *Eliz. cap.* 11. of Leaſes, expreſſes Clauſes to make all Covenants void, which ſhews that otherwiſe

they

they ſhall not be taken away. 2. This Covenant is a collateral Thing. 3. It was a Fault in the Leſſee to make ſuch a Covenant, he might have made a Covenant to diſcharge all ordinary Charges. 4. Authorities upon the ſame Reaſon, Statute of *Sewers*, 23 *H.* 5. ſaith, That every one who may have Benefit or Loſs ſhall contribute; yet it hath been adjudged, that if any particular Perſon be to repair a Bank by Preſcription, he, and no other, ſhall repair it. 5 *Rep.* 100.

But Serjeant *Rolls* and others wrote *contra*: 1. Becauſe the Leſſor is Party to the Act of Parliament, and hath diſpenſed with it, as in 6 *Rep. Morris*'s Caſe. 2. The Intent of the Act was to eaſe the Leſſee of part of the Burden, and put this Part on the Leſſor. 3. *Alias*, the Leſſee by the Force of the Covenant ſhall be driven to pay all the Rent to the Leſſor, and yet to bear all the Charge of the Tax, and the Leſſor ſhall have all his Rent, and ſhall pay no Charge of the Tax, which will be againſt the Words and Intent of the Act: As to the Objection on the Statute of *Sewers*, the Book is not ſo, for the Commiſſioners may tax all if they will, upon the Words of the Statute. *In a private Manuſcript*,

Per Ch. Juſt. Rolls, & Juſt. Nichol, nullo contradicente, in *Rawſon* and *Marten*'s Caſe, *Trin.* 1650. *in ſuper Banco*, it was held, that if an Ordinance of Parliament is, that the Leſſee ſhall deduct the Monthly Aſſeſſment for the Parliament Army out of his Rent, and the Leſſee covenants in his Leaſe to pay all the Taxes and Charges, for or by Reaſon of the Land; if this Leaſe was made before the Ordinance, there the ſubſequent Order of Parliament

Parliament ſhall take away this Covenant, becauſe every one is privy to an Act of Parliament; and ſo the Leſſor, by this ſubſequent Ordinance, hath taken away the Covenant, and then it's all one as if the Leſſor had ſaid, I will pay it, and you ſhall not pay it; *alias*, if the Leaſe had been made after the Ordinance.

When a Thing is to be done upon Requeſt.

Agreement was made to aſſign a Stock upon Requeſt, and for Non-performance, Action was brought, ſetting forth the Agreement, and that the Plaintiff did requeſt the Defendant at ſuch a Time, *&c.*

Defendant pleaded, He was ready to aſſign the Stock after the Promiſe made, *&c.* and upon Demurrer it was ruled, if the Thing was not to be done upon Requeſt, then the Defendant was bound to do it in convenient Time after the Promiſe; but it being to be done upon Requeſt, the Time when the Plaintiff will require the Performance of the Agreement, is the Time when the Defendant muſt do it. 3 *Mod.* 295. *Hariſon* and *Hayward.*

Demand at other Place than Payment.

Reaſonable Time for Payment.

If *A.* recite by Deed, That where he is indebted to *B.* in 100 *l.* he covenants with *B.* That the ſaid 100 *l.* ſhould be paid to *B.* or his Aſſigns, at *Rotterdam* in *Holland*, by *C.* *abſq; aliqua ſecta Legis ſuper primam Requiſitionem quæ de eodem faceretur.* In this Caſe, the Demand may be made at any other Place than *Rotterdam*; for though Payment is to be made there, yet he may demand it at any other Place in *England*, or at *Dort*, for he ought to have reaſonable Time for Payment after Demand, having Reſpect to the diſtance of the Place. 1 *Rol. Abr.* 443. *Halſted's* Caſe.

CHAP.

CHAP. XXVI.

Requeſt. Vide *Notice, in Title Declaration.*

Requeſt, to what preceding Clauſes it ſhall relate.

IF *A.* covenants with *B.* upon reaſonable Requeſt to him made by *B.* to ſurrender certain Land, and all his Intereſt in it to *B.* and alſo to permit *B.* to take the Profits of the Land; in this Caſe the Requeſt doth not go to the taking of the Profits, but only to the Surrender; ſo that he is bound to ſuffer him to take the Profits without Requeſt, although there is but one Word that goes to the whole. 2 *Rol. Abr.* 248, 249. *Sims* and *Smith.*

Whereas *B. per* other Indenture, had aſſigned to *C.* a Meſſuage, *&c.* Now this Indenture witneſſeth, that *R.* covenants, That he or his Brother would deliver to *C.* or, in his Abſence, to *E.* at his Shop, a Tarrier of the Premiſſes, and of the Verity of this, *ad optimam eorum peritiam*, upon Requeſt made to them by *C.* would take their Oath before a Maſter of the *Chancery*, and alſo would deliver to one *W.* ſafely to be kept to the Uſe of the ſaid *B.* and *C.* the Original Demiſe, whereof he then had a Copy, *&c.* Though in this Caſe they are not bound to make Oath without Requeſt, yet they are to deliver the Original Demiſe *ſans* Requeſt, for the Requeſt refers not to this, but the firſt, as appears by putting the Requeſt amongſt the Covenants, and not in the Beginning or End. 2 *Rol. Abr.* 250. *Smith* and *Garbutt.*

Requeſt, to what preceding Clauſes it ſhall relate, or not.

The

The Plaintiff declares, That the Defendant had covenanted to pay him ſo much Money as he ſhould expend for Repairing and Victualling a Ship for him; and avers, That he had ſpent 300 *l.* in Repairing and Victualling it, and that he gave the Defendant Notice of it ſuch a Day, and for Non-payment brings the Action. Defendant *Proteſtando*, That the Plaintiff had not laid out 300 *l.* in Manner and Form as he had declared: Demurs to the Declaration; 1. Becauſe he hath not averred a Special Breach of Covenant; but this hath been often overruled. 2. There is no Requeſt alledged to pay the Money, and without Requeſt he is not bound to pay it. *Per Cur'*, The Plaintiff's Action is not an Action of Debt where a Demand is neceſſary, but an Action of Covenant where it is not neceſſary to alledge a Demand. *Stiles Rep.* 31.

Where a Special Breach of Covenant need not be alledged.

Where it is not neceſſary in Covenant to alledge a Demand.

The Condition was, to make Aſſurance of certain Lands to the Obligee before the 10th of *March*, 17 *Eliz.* and if it fortunes, that the Obligee refuſe to accept the Aſſurance, and ſhall make Requeſt to have 100 *l.* in Satisfaction of it; then if upon ſuch Requeſt, within 5 Months after, he pay the 100 *l.* that then, *&c.* and at the Day he refuſed the Aſſurance, and afterwards, 27 *Eliz.* he maketh Requeſt to have the 100 *l.* The Qu. was upon Demurrer, Whether this Requeſt was ſufficient for the Time? *Per Cur'*, A Requeſt at any Time, during his Life, was good, and he is not reſtrained to make it at or before the Day the Aſſurance was to be made. Judgment *pro Quer'*, *Cro. Eliz.* 136. 1 *Lev.* 185. *Meſme* Caſe.

Requeſt during Life.

Co-

Covenant to make a good and lawful Eſtate, as by the Councel Learned of the Plaintiff, upon Requeſt made, ſhall be adviſed; and Plaintiff alledgeth *M. T.* was of his Councel Learned, and gave his Advice to the Plaintiff, that the Defendant ſhould make ſuch Aſſurance, *&c.* and that the Plaintiff gave Notice to the Defendant of the ſaid Advice, and requeſted him to perform it, and the Defendant denied.

It's moſt proper the Councellor ſhall give his Councel to him, with whom he is of Councel; and he, to notify it to him that makes the Eſtate, and if the Councellor gives Advice to him that is to make the Eſtate, he may be ignorant whether he be of his Councel or not. 5 *Rep.* 19. *b. Higginbotham's* Caſe.

Covenant to convey according to the Draughts agreed, he need not tender Wax, *&c.* for he had taken it upon him.

In Conſideration the Plaintiff had promiſed to pay the Defendant 700 *l.* for the Reverſion of a Mannor, the Defendant covenanted to ſeal the Inſtrument for the Aſſurance of it, with Warranty, *&c.* according to the Draughts between them before agreed; and though the Defendant tendered to him the 1ſt of *March* the Inſtrument written, *Secundum tractationes præd'*, and the 3d of *March* requeſted him to ſeal them, yet he had not ſealed them, nor conveyed the Reverſion of the Mannor; after Verdict *pro Quer'*, moved in Arreſt of Judgment,

1. That he ought to ſhew the Inſtruments to the Court, that they might judge of them; to which it was anſwered and reſolved, the Inſtruments were agreed before, and therefore he need not ſhew them to the Court.

2. He doth not ſhew that he tendered him Wax, Pen, Ink. *&c.* as he ought; to which it was anſwered and reſolved, There need no Tender, for the Defendant had taken upon him to do it.

3. The Requeſt is not well made, being at another Time, not when the Tender was; but it was reſolved the Tender after the Requeſt was the better, for ſo he had Time to read them and conſider them.

And by *Windham*, Juſtice, where Conveyances are before agreed, and to be ſealed according to this Agreement, ſo that there is not any need of Councel, the Defendant is to do it at his Peril; and where one is to grant a Reverſion, he had Time to do it at any Time during his Life, if it ſo long continue a Reverſion, if he be not haſtened by Requeſt. Here is a Requeſt, and the Conveyances being agreed, no Tender need to be; but if one be to ſeal a Conveyance generally, there the Councel of the Purchaſer is intended to draw them, and then the Purchaſer ought to tender them. 1 *Lev.* 44: *Webb* and *Bettel*. 1 *Keeble* 122. *Meſme* Caſe.

When Tender of a Conveyance is requiſite or not.

CHAP. XXVII.

Covenant, That he is ſeized in Fee.

Covenant, That he was ſeized in Fee, without Condition.

COvenant, That he was ſeized in Fee at the Time of the Bargain and Sale, without Condition or Limitation, and the Breach aſſigned by the Plaintiff that he was not ſeized in Fee, he is not bound to ſhew in whom the Eſtate was, to which the Bargainor only is privy; as 9 *Rep.* 61. Alſo his Replication could have been only, That he was ſeized in Fee, and not *abſque hoc*, That any Stranger was ſeized; and it is a good Covenant that he is ſeized in Fee, and the Words, [Without Condition or Limitation] by *Windham*, is *ſuper addition*, That he hath a good Eſtate in Fee, and doth not qualify or alter the Fee, tho' Condition muſt be ſhewed by him that pleads, that he was ſeized in Fee, confeſſing it, but that it was on Condition. *Quære*, 1 *Keb.* 58. *Glimſton* and *Audley*.

A Covenant, That he is ſeized of a good Eſtate in Fee; the Plaintiff takes Iſſue by Replication, That he was not ſeized of a good Eſtate in Fee. Defendant rejoins, he was ſeized of as good an Eſtate as Sir *J. Woollaſton*, who granted it to him, had; which is nothing to the Purpoſe, becauſe that he was ſeized of a good Eſtate, according to ſuch an Indenture, refers to the Eſtate paſſed by the Indenture it ſelf, and not to him that made it; which the Court agreed, and Judgment *pro Quer'*. 1 *Keb.* 95. *Cookes* and *Fownes* Caſe.

It

It is reported thus, in 1 *Lev. fol.* 40. Covenant and declares, That the Defendant bargained and ſold to him certain Lands, (which he had purchaſed of *Woollaſton* and other Truſtees, in the late Times, for the Sale of Delinquents Eſtates) and covenants, That he was ſeized of a good Eſtate in Fee according to the Indenture made to him by *Woollaſton, &c.* and aſſigns for Breach, That he was not ſeized of a good Eſtate in Fee. The Defendant pleads, he was ſeized of ſo good Eſtate as *Woollaſton, &c.* conveyed to him. Plaintiff demurs, and Judgment was given for him, for the Covenant is abſolute that he is ſeized of a good Eſtate in Fee, and the Reference to the Conveyance by *Woollaſton* ſerves only to denote the Limitation and Quality of the Eſtate, not the Defeaſibleneſs or Undefeaſibleneſs of the Titles. 1 *Lev.* 40.

Covenant, That he is ſeized in Fee according to the Indenture by which he purchas'd the Covenant, is abſolute.

Leſſor covenants, That he was then ſeized in Fee of an indefeaſible Eſtate. The Plaintiff in his Declaration, in *facto dicit*, That at the Time of making the Indenture he was not lawfully ſeized in Fee, and ſo he had not performed the ſaid Covenant. Defendant pleads, *non eſt factum.* The Breach is well aſſigned, though he ſhews not that any other was ſeized, becauſe the Covenant is general, and ſo the Breach may be aſſigned as generally, eſpecially as this Caſe is, where the Defendant hath made the Declaration good by Pleading *non eſt factum.* So he allows the Breach, if it had been his Deed. *Cro. Jac.* 369. *Miſſet* and *Ballet.*

Breach may be aſſigned as general as the Covenant is.

B. covenants, he was ſeized of *Black-Acre* in Fee-Simple, whereas in Truth it was Copyhold Land in Fee. *Per Cur'*, the Covenant is not broken: *Quære*, becauſe the Reporter adds, the Jury ſhall give Damages according to that Rate that the Country value Fee-Simple Lands more than Copyhold. *Noy.* 142. *Gray* and *Briſcoe.*

Covenant, That the Defendant was lawfully ſeized, is intended as to the Title, and a Covenant for quiet Enjoyment is as to the Poſſeſſion. 3 *Keb.* 755. *Gregory* and *Mayo.*

Covenant that he hath Power to ſell.

I now have Heirs and Aſſigns by theſe Preſents, by the Will aforeſaid, do own full Power, good Right, and lawful Authority, to ſell, good, and the Words [Heirs and Aſſigns,] are inſenſible and Surpluſage; he ought to be Owner of a Power, as well as Owner of the Land. 1 *Rol. Rep.* 84. *Goodman* and *Knight.*

That the Leaſe is a good Leaſe.

On a Leaſe by Tenant in Tail, and not warranted by the Statute.

In Covenant by Leſſee of Tenant in Tail, not warranted by the Statute (on Aſſignment to the Plaintiff), That he was poſſeſs'd of the Indenture, and that it was unavoided and unavoidable; Tenant in Tail dies, and Breach aſſigned, that the Iſſue entered and demurred thereon: The Courts inclined this was no Breach, unleſs it had been, that it ſhould continue ſo during the Term, or that the Aſſignee ſhould enjoy it during the Term, for the Leaſe is only voidable on the Contingent

gent of the Death of Tenant in Tail. 3 *Keb.* 816. *Hemingway* and *Sad.*

By Agreement between the Plaintiff and the Teſtator of the Defendant, a Parcel of Land was to be ſold for 400 *l.* but if it did not ariſe to ſo much, then they covenanted with each other to repay proportionably to the Abatement; and the Defendant's Teſtator covenanted for himſelf and his Executors, to pay his Proportion to the Plaintiffs, ſo as the Plaintiff gave him Notice in Writing by the Space of 10 Days, but ſaith not ſuch Notice was to be given to his Executors or Adminiſtrators.

Notice in Writing to Executors.

On Oyer of the Indenture, there was a Variance between the Covenant (which was for Notice to be given to the Teſtator) and this Declaration, by which Notice is averred to be given to the Executor, and ſo a Demurrer. *Per Cur'*, this is no material Variance, becauſe the Covenant runs in Intereſt and Charge, and ſo the Executor is bound to pay, and therefore it is neceſſary that he ſhould have Notice: But the Declaration was nought for another Reaſon; They had not declared that this Notice was given in Writing, and that he gave Notice, *Secundum formam & effectum Conditionis*, was not good. 2 *Mod.* 268. *Harwood* verſus *Hilliard.*

CHAP. XXVIII.

On a Covenant in a Feoffment that he was Owner, and ſeiſed of an indefeaſible Eſtate, &c.

Warw. A. B. *nuper de* B. *in Com' præd' Gen' alias dict'*, [*A. B.* of *B.* in the County of Warwick,] *ſummonit' fuit ad reſpond'* J. C. *Ar' de placito quod teneat ei conventionem inter eos factam ſecund' vim formam & effectum quarundam Indenturarum inter eos confectar'*, &c. *Et unde idem* J. *per* F. G. *Attorn' ſuum dicit quod cum præd'* A. *per quandam Indentur' factam apud* K. *(tale Die & Anno) inter præd'* A. *per nomen*, &c. *ex unâ parte & præd'* J. *per nomen*, &c. *ex altera parte, cujus alteram partem, Sigillo præd'* A. *Sign' idem* J. *hic in curia profert' cujus dat' eſt iiſdem Die & Anno teſtatum ſit quod præd'* A. B. *pro & in Conſideratione ſumme ducentarum & undecim Librarum legalis Monetæ Angliæ ei per præfat'* J. C. *ante ſigillationem Indenture præd' bene & fidelit' ſatisfact' & ſolut' unde præd'* A. B. *per Indenturam præd' acquietavit & relaxavit præd'* J. C. *Executores & Adminiſtratores ſuos imperpetuum dediſſet conceſſiſſet barganizaſſet vendidiſſet feoffaſſet & confirmaſſet præfat'* J. C. *Hæredibus & Aſſignat' ſuis totum manerium de*, &c. *cum omnibus juribus partibus annex' membris hereditamentis & pertinentiis quibuſcunq; inde vel ad eadem inciden' vel ſpectan' ac omnia illa meſſuagia terras tenementa vel hereditamenta cum pertin' communit' vocat' vel cognit' per nomen ſive nomina de*, &c. *in paroch' de* K. *in Com'* Warwick, *ac etiam omnia & ſingula Domos edificia ſtructuras,*

Conſideration.

ſtructuras, [*Anglice,* Buildings,] *pomaria gardina prata terras paſturas paſcuas vaſt' communias moras moriſcos boſcos ſubboſcos reddit' reverſiones remaneria officia,* [*Anglice,* Duties,] *ſervitia proficua emolumenta commoditates, libertates franches' immunitates & hereditamenta cum ſuis pertinentiis quæcunq; exiſtentia part' parcel' vel membra præd' manerii de* C. *vel tenementorum de* M. H. *vel ill' vel alteri eorum ſpectan' vel ſic accept' reputat' vel capt' vel cum eiſdem vel eorundem altero vel aliqua parte inde ante tunc,* [*Anglice,* heretofore,] *locat'* [*Anglice,* ſett,] *dimiſſ'* [*Anglice,* let,] *capt' & fruct' ſituat' jacen' & exiſten' in,* &c. *(manerio de* C. *cum omnibus ſuis partibus membris & pertinentiis ex conceſſione præd' except' & foris prizat') omnia que Præmiſſa præd'* A. B. *nuper perquiſivit ſibi & Hæredibus ſuis imperpetuum de* F. T. *de,* &c. *ſimul cum omnibus ſcriptis chartis cur' rotulos eſcript' inſtrument' & evidenciis quibuſcunq; concernen' Præmiſſa totum vel aliquam partem vel parcell' inde habend' & tenend' præd' manerium de* T. *& præd' Præmiſſa in Parochia,* &c. *& omnia & ſingula alia Præmiſſa quæcunq; cum ſuis pertinentiis ante per Indentur' præd' dat' conceſſ' barganizat' vendit' & confirmat' mentionat'* [*Anglice,* mentioned,] *intens'* [*Anglice,* intended,] *dari barganizari vendi enfeoffari & confirmari præfat'* J. C. *Hæredibus & Aſſignat' ſuis imperpetuum ad ſolum opus uſum & beneficium,* [*Anglice,* behoof,] *præd'* J. C. *Hæredum & Aſſignatorum ſuorum imperpetuum. Et præd'* A. B. *& Hæredes ſui omnia & ſingula Præmiſſa cum pertinentiis præfat'* J. C. *Hæredibus & Aſſignat' ſuis imperpetuum contra omnes gentes War' antizarent & per Indentur' præd' defenderent. Et præd'* A B. *pro ſeipſo Hæredibus, Executoribus, & Adminiſtratoribus ſuis, & quolibet eorum per Indenturam præd' convenit promiſit & conceſſit ad &*

cum præfat' J. C. Hæredibus, Executoribus, & Administratoribus, & Assignat' suis, imperpetuum & ad & cum quolibet eorum quod ipse præd' A. B. ad sigillationem & deliberationem Indentur' præd' fuit verus Proprietarius, [*Anglice,* Owner,] *& legitime seisit' de & in singulis Præmissis cum suis pertinen' præantea per Indentur' præd' dat' conceſſ' barginat' & vendit' vel mentionat'* [*Anglice,* intended,] *dari concessi barganizari & vendi & de qualibet parte & parcella inde cum suis pertinentiis boni perfecti & indefecibilis status Hæreditat'* [*Anglice,* Inheritance,] *in feodo simplici absq; aliqua defeasantia conditione vel limitatione usus vel confidentie,* [*Anglice,* Truſt,] *ad evacuand'* [*Anglice,* to avoid,] *alterand'* [*Anglice,* to alter,] *mutand' determinand' vel transferend' eadem & quod ipse habuisset plenam potestatem bonum jus habilitatem & authoritatem in lege concedere barganizare vendere enfeoffare & conveyare eadem & quamlibet partem & parcell' inde præfat' J. C. Hæredibus & Assignat' suis, modo & forma super dict' & secundum intentionem Indenture prædict'* [and a Covenant to ſtand ſeiſed.] *Et idem J. ulterius dicit quod licet ipse a tempore confectionis Indentur' præd' usq; diem impetrationis brevis originalis ipsius J. bene & fidelit' observavit performavit perimplevit & custodivit omnia & singula conventiones concessiones & agreeamenta in Indent' præd' superius spec' ex parte ipsius J. observanda, perimplenda performanda & custodienda secundum formam & effectum Indenture prædicte protestando etiam quod præd' A. B. non observavit perimplevit performavit seu custodivit aliqua concessionem seu agreeamentum in Indentura prædicta superius specificat' ex parte ejusdem A. observand' performand' perimplend' & custodiend' secundum formam & effectum Indenture præd'. In facto idem J. dicit quod præd' A. tempore sigillationis & deliberationis*

Breach.

tionis Indenture prædicte hic in Cur' prolat' non fuit verus Proprietarius, [Anglice, Owner,] & legitimè ſeiſitus de omnibus & ſingulis Præmiſſis præd' &c. cum pertinen' [except præ except',] antea per Indenturam illam dat' barganizat' conceſſ' & vendit' vel mentionat' inten [Anglice, intended,] dari concedi barganizari & vendi & de qualibet parte & parcella inde cum pertin' bone perfecte & indefeſibilis ſtatus Hæreditatis in feodo ſimplici abſq; aliquibus defeaſantia conditione vel limitatione uſus vel confidentia, [Anglice, Truſt,] evacuare alterare, [Anglice, change,] determinare vel tranferre eadem ſecundum formam & effectum Indenture prædicte. Et idem J. ulterius in facto dicit quod præd' A. tempore ſigillationis & deliberationis Indenture prædicte hoc in Cur' prolat' non habuiſſet plenam poteſtatem bonum jus habilitatem & authoritatem in Lege concedere barg nizare enfeoffare & conveyare Præmiſſa prædict' in Indentura præd' ſuperius ſpecificat' & quamlibet partem & parcellam inde præfat' J. C. Hæredibus & Aſſignat' ſuis ſecundum formam & effectum Indenture illius. Et ſic idem J. dicit quod præd' A. licet ſepius requiſit' conventionem præd' de eo quod præd' A. per Indenturam præd' pro ſeipſo Hæredibus, Executor' & Adminiſtr' ſuis & eorum quolibet convenit promiſit & conceſſit ad & cum præd' J. C. Hæred' Executor' & Adminiſtratoribus ſuis, & ad & cum quolibet eorum quod ipſe præd' A. B. ad ſigillationem & deliberationem Indenture præd' fuit verus Proprietarius & legitimè ſeiſitus fuit de omnibus & ſingulis Præmiſſis cum pertin' præantea per Indenturam præd' dat' conceſſ' barganizat & vendit' aut mentionat' & intens' dare concedi barganizari & vendi & de qualibet parte & parcella inde cum pertin' de bono perfect' & indefezibili ſtatu Hæreditat' in feodo ſimplici abſq; aliquibus defezantia conditione ſive limitatione uſus vel confidentia,

That he was not Owner,

fidentia, [*Anglice,* Truſt,] *evacuare alterare mutare determinare vel transferre eadem & quod ipſe habuit plenum bonum jus habilitat' & authoritatem in Lege concedere barganizare vendere enfeoffare & conveyare Præmiſſa præd' & quamlibet partem & parcell' inde præfat' J. C. Hæredibus & Aſſignat' ſuis, modo & forma præd' & ſecundum intentionem Indenture præd' eidem J. non tenuit ſed infregit & illam ei tenere hucuſq; contradixit & adhuc contradicit unde dicit quod deteriorat' eſt & dampnum hæc ad valentiam quinquagint' Librarum & inde produc' ſectam,* &c.

A. conveys a Meſſuage with the Appurtenances to *B.* and his Heirs, and alſo grants to him Liberty of Ingreſs to a Well, *&c.* to draw Water, *&c.* And *A.* covenants with *B.* that he was ſeiſed of the Premiſſes: It's no good Breach, that *A.* was not ſeiſed in Fee of the Well, for that the Covenant that he was ſeiſed in Fee of the Meſſuage and Premiſſes, doth not extend to the Well, *Lut.* 608.

Notice.

Notice.

Who ought to give Notice. To whom Notice ought to be given.

If a Man covenant with *J. S.* That if he will marry *A. W.* his Couſin, to pay to him 10 *l.* at the Day of his Marriage, *J. S.* need not give Notice at what Day he will be married, but he ought to take Notice of it at his Peril, in as much as he hath taken upon him to pay it at the Day, tho' the Marriage is to be made by *J. S.* himſelf, *Beresford* and *Goodrouſe*, 14 *Jac.* Quære. Notice of Marriage.

If *A.* ſell Lands to *B.* by the Name of Twenty Acres, according to the Rate of 20 *l.* for every Acre; and it is agreed between the Parties, that the Land ſhall be meaſured by *J. S.* before the Firſt Day of *Jan.* next enſuing, and *A.* covenants to repay according to that Rate for every Acre before the Firſt Day of *May* after: If there are not Twenty Acres upon the Meaſure, and it's found there are not Twenty Acres, *A.* ought to pay this before *May* at his Peril, without any Notice given how many Acres there wants of Twenty, for he had taken upon him to perform it at his Peril, *Goates* and Sir *Baptiſt Hycks* Caſe, 1 *Rol. Rep.* 314. 2 *Cro.* 390. *id.* Caſes. Where a Man takes upon him to perform a Thing at his Peril.

If *A.* covenant with *B.* to make ſuch Aſſurance to him of the Mannor of *D.* as the Councel of *B.* ſhall deviſe, before ſuch a Day, and after the Councel deviſeth an Aſſurance, *B.* ought to give Notice of it to *A.* Notice of Aſſurance.

If

To find great Timber for Reparation.

If a Man leaſe a Mill for Years, and the Leſſee covenants to repair the Mill, and Leſſor covenants to find him great Timber for it; the Leſſee ought to give Notice to the Leſſor how much will ſuffice for the Reparation, and not to demand Timber for Reparation in general, or otherwiſe the Leſſor is not bound to deliver any, *Holder* and *Taylor*, 12 *Jac. B.*

A. covenant to pay to *B.* all ſuch Money as by a true and juſtifiable Bill under the Hand of the Attorney of *B.* ſhall appear to be before diſburſed by *B.* or his Attorney. In Action, if *B.* aſſign for a Breach, that 24 *l.* by a true and juſtifiable Bill under the Hand of *J. S.* Attorney of *B.* appears to be diſburſed, which *A.* hath not paid: This is a good Breach, without alledging *A.* had Notice of it, or that the Bill of the Attorney was ſhewed to him, for that the Attorney was a Stranger, of which *A.* ought to take Notice at his Peril, *Dewell* and *Wilmott.*

To take Notice at his Peril.

Notice of Aſſurance.

If I be bound to you to make you ſuch an Aſſurance as *J. S.* ſhall deviſe, I am bound at my Peril to procure Notice; but if I be bounden to you to make ſuch Aſſurance as Councel ſhall adviſe, there Notice ought to be given to me. 1 *Leon.* 104. Q. this Book.

Bound himſelf to take Notice of it.

The Defendant covenants to pay the Plaintiffs and other Mariners their Wages; and the Plaintiff avers, that 5 *l.* was due for a Month after his Departure in the Ship ſuch a Day from *Blackwall*; but avers no Notice given to the Defendants of his Return, or going out, nor what was due, for which Cauſe the Defendant demurs. And *per Cur'*, the Defendant hath bound himſelf, and muſt take Notice of it, as well as if it were to do a Thing

a Thing in his own Coniſance, 1 *Keb.* 681. *Eli* and *Roberts.*

Y. Leſſee of the Biſhop of *R. pro* Years, covenants to find neceſſary Proviſion for the Steward, the Biſhop, his Servant and Horſe, at all Times that he held Courts there. *Per Dodderidge*, he ſhall take Notice, and there needs no Perſonal Notice, for General Notice, as Proclamation at Court, is given to him, *Palmer* 532. the Biſhop of *Rocheſter* verſus *Young*.

General Notice, as upon a Proclamation in Court, where ſufficient.

In Covenant, the Plaintiff declares upon a Writing of the Defendant's Teſtator, acknowledging himſelf to be accountable to the Plaintiff for whatever Money the Plaintiff ſhould charge upon *J. S.* payable to Sir *Tho. Viner*. *Per Cur'*, it lies well, being againſt Executors, and ſo had it been againſt the Party himſelf; no Notice is given by the Plaintiff to *J. S.* who upon ſuch Bills was to pay to Sir *Tho. Viner*, and it's not neceſſary, 1 *Keb.* 155. 1 *Lev.* 47. *meſme* Caſe.

Where Notice not neceſſary.

In Point of Covehant, Notice is not to be ſo ſtrictly given as upon an Obligation, which is in Point of Forfeiture, *Cr. Jac.* 390. Sir *Baptiſt Hicks*'s Caſe.

CHAP.

CHAP. XXIX.

Covenants concerning Copyhold Eſtates.

THE Condition is, That he ſhall make a good, abſolute, and perfect Aſſurance, in Fee of Copyhold Lands, and after he ſurrenders this upon Condition of Payment of Money: It is not any Performance, for the Aſſurance ought to be abſolute; and it muſt not only be an abſolute, but an effectual Conveyance.

Covenant to ſurrender, it muſt be an abſolute and effectual Surrender.

If a Man be bound to ſurrender a Copyhold to the Uſe of *A.* and his Heirs, on Conſideration of Money; if he ſurrender it into the Tenants Hands, he muſt get it preſented, for it muſt be an effectual Surrender, 1 *Rol. Abr.* 425. *Shan* and *Belby*.

The Defendant covenanted, that ſhe would make a lawful Surrender of ſuch Copyhold Lands upon reaſonable Requeſt, and that ſhe would permit the Plaintiff to enjoy the ſaid Land, and to receive the Rents quietly, without Interruption. And the Plaintiff ſhews ſhe was a Copyholder of ſuch Lands, and alledges the Cuſtom, that ſhe might ſurrender by Letter of Attorney into the Hands of Two Tenants out of Court, and ſhews he cauſed a Letter of Attorney to be made for the Defendant to ſeal, to give Authority to Two ſuch Perſons named therein to ſurrender at the next Court, and tendred it unto her to ſeal, and ſhe would not ſeal it, nor ſurrender at the next Court holden on ſuch a Day, and that ſhe received the Rents of the

ſaid Lands for ſuch a Time, and ſo brake her Covenant by not ſurrendring upon that Requeſt. Defendant pleads, That the Plaintiff tendred a Letter of Attorney to her to ſeal, and becauſe ſhe did not know what was therein contained, ſhe required reaſonable Time to be adviſed by her Councel, and the Plaintiff refuſed to give her any Time to adviſe thereupon, for which Cauſe ſhe did not ſeal it. Plaintiff demurs. *Per Cur'*, Firſt, The Breach is not well aſſigned, for ſhe is by her Covenant to make Surrender upon Requeſt, but is not bound to make a Letter of Attorney to make a Surrender. It was moved it is a Breach of Covenant, becauſe ſhe did not ſurrender at the next Court; and that a Requeſt to make a Letter of Attorney to ſurrender, implied a Requeſt to make a Surrender, *ſed non alloc'*, for it ought to be an expreſs Requeſt to make a Surrender, and not an implied one, *Cr. Car.* 299. *Syms* and Lady *Smith*, *Godb.* 445. *Jones* 314.

Reaſonable Time to adviſe about the Surrender.

By Covenant to make a Surrender upon Requeſt, not bound to make a Letter of Attorney.

Expreſs Requeſt.

Error of a Judgment in *B. C.* where the Plaintiff declares, That it was agreed between him and the Defendant, that the Plaintiff ſhould ſurrender to the Defendant certain Copyhold Lands, and that the Defendant ſhould pay to the Plaintiff ſo much; and in Conſideration that the Plaintiff had aſſumed to perform the Agreement on his Part, the Defendant aſſumed to perform the Agreement on his Part, and avers, he ſurrendered into the Hands of Two Copyholders, according to the Cuſtom, to the Uſe of the Defendant, and that the Defendant had not paid. Defendant demurs, Judgment *pro Quer'*, in *B. C.* Error brought and aſſigned, that the Surrender into the Hands of

Agreement to ſurrender Copyhold to the Uſe of *A.* If ſurrender into the Hands of Two Copyholders, according to the Cuſtom, be a good Performance?

of Two Copyholders was not a good Performance on the Part of the Plaintiff; but it was answer'd upon Agreement to Surrender, generally, surrender any Way is sufficient; but *Twisden* held this Surrender no Performance; *Keling contra*: But *per Cur'*, here being mutual Promises, no Averment need to be of the Performance, and therefore ill Averment of that which need not be averred shall not hurt, the Judgment was affirmed, 1 *Lev.* 293. *Beauy* and *Turner*, 2 *Keeble* 666. & 1 *Mod.* 61. *id. Casus.*

Covenant to assure Copyhold Land, Covenantor ought to procure a Court to be held.

Covenant that he should assure such Copyhold Lands to the Plaintiff, if he married with his Daughter *secundum Leges Ecclesiasticas*; and alledgeth, that he *rite & legitimè* espoused the Daughter of the Defendant. *Per Cur'*, it is sufficient to the Plaintiff to alledge *licet sepius requisivit*, without giving Notice of the Marriage, for he at his Peril ought to take Notice thereof; and he need not shew a Court to be holden, for he ought to procure a Court to be held. *Cr. Jac.* 102. *Fletcher* and *Pynset*. 1 *Lev.* 41. *Bassett* and *Morgan*.

Surrendree or Assignee of a Reversion of a Copyhold Estate may bring Action of Covenant against Lessee for not repairing of the Premisses; and that he is within the Equity of the Statute, 32 *H.* 8. *c.* 34. 4 *Mod.* 80. *Glover* and *Cope*.



CHAP.

CHAP. XXX.

How and in what Caſes an Infant ſhall be bound by his Covenant, or not.

INfant ſhall not be bound by his Covenant, unleſs for Neceſſaries; or by Covenants in Indenture of Apprentiſhip.

Now Infant ſhall be bound by his Contract for Neceſſaries, *(viz.)* Diet, Apparel, Learning, and neceſſary Phyſick; therefore it was adjudged in *Dale* and *Copping*'s Caſe, the Covenant of an Infant to pay Money for the Curing him of the Falling-ſickneſs, is good.

In 2 *Rol. Rep.* 271. by *Haughton.* If Infant have Houſes, it is neceſſary for him to have them in Repair, and yet Contract to repair doth not bind him; no Contract binds him, but what concerns his own Perſon.

If Infant promiſeth another, That if he will find him Meat and Drink, and pay for his Learning, that he will pay him 7 *l. per Annum*, Action lies on this Promiſe; and altho' it is not mentioned what Learning it is, yet it ſhall be intended that that is fit for him, until it be ſhewed to the Contrary of the other Part, 1 *Rol. Abr.* 729. *Pickering*'s Caſe.

Learning, tho' it be not neceſſary *de eſſe*, yet it is ſo *de bene eſſe*; *& omne quod eſt utile eſt aliquando neceſſarium*, 1 *Inſt.* 172. *Pal.* 528.

But Contract for Dancing is not binding.

It was a Queſtion in *Whittingham* and *Hill*'s Caſe, Whether an Infant buying of Neceſſaries to maintain his Trade were binding or not? Error of a Judgment was brought in

Shrewsbury in *Aſſumpſit*, to pay ſuch a Sum for Wares ſold. Defendant pleads, he was within Age at the Time of the Wares being ſold. Plaintiff *proteſtando*, that he was not within Age: *pro Placito* ſaith he bought them *pro neceſſario victu & apparatu, & ad manutenenciam familiæ ſuæ.* Defendant rejoins, that he kept a Mercer's Shop at *Salop*, and bought theſe Wares to ſell again, and traverſeth that he bought them *pro neceſſario victu & apparatu.* Plaintiff demurs for whom it was adjudged. Error was aſſigned in Point of Law, that ſuch Buying ſhall not bind an Infant: And *per Cur'*, his buying to maintain his Trade, tho' he get his Livelihood by it, ſhall not bind him, *Cr. Jac.* 494.

But if an Infant is Houſekeeper, and buys Neceſſaries for his Houſhold, it ſhall bind him, 3 *Keb.* 387. and adjudged ſo in *Hill* and *Blackſtone*'s Caſe there cited. Q. *le Liver.*

It was ſaid by *Coke, arguendo* in *Stone* and *Withypool*'s Caſe, 1 *Leon.* 113. In Debt againſt Infant on Contract for Neceſſaries, the Plaintiff ought to declare ſpecially, ſo as the whole Certainty may appear; upon which the Court muſt judge, if the Expences were neceſſary or convenient, or not, and alſo upon the Reaſonableneſs of the Price: But in *Ruſſell* and *Lucy*'s Caſe, 1 *Keb.* 382. & 1 *Lev.* 86. the Particulars are needleſs to be ſet forth. It muſt be averred in the Declaration, that the Clothes were for his own wearing, and that they were convenient and neceſſary.

Infant

Infant and another of full Age covenant one againſt the other, the Covenant of the Perſon who is of full Age ſhall bind him; 1 *Sid.* 446. *Farnham* and *Atkins.*

As to Covenant in Indentures of Apprentiſhip, vid. Tit. Apprentices.

In Covenant to inſtruct an Apprentice, or cauſe him to be inſtructed in the Trade of a Sadler, and to find him Meat, Drink, and Lodging during the Term. The Plaintiff ſhewed the Teſtator's Death, and that ſuch a Day he was turned out of Doors by the Defendant, *& ſi conventionem fregit in hoc, (viz.)* in not inſtructing him, *&c.* Defendant demurs, becauſe it is a Perſonal Covenant, and diſcharged by Death, and cannot be aſſigned: But all the Court enclined, had it been only to inſtruct, it had been diſcharged, but being complex to inſtruct and to find Meat, it is not; and if it were, yet the Breach is ſufficiently aſſigned, if either Part be true, as here in turning him out. Judgment *pro Quer'*, 1 *Keb.* 820. *Wadſworth* againſt the Executors of *Guy.* Diſcharge.

CHAP. XXXI.

Covenant free from Incumbrances.

COvenant in a Bill, containing, That the Defendant granted to the Plaintiff all his Right, Title, and Intereſt, which he then had of and in the Lands in *B.* lately granted by *L. D.* or *Robert Fiſh* for Twenty Years by Indenture, and covenants with the Plaintiff that he is lawful Owner of the Indenture, Demiſe, Term of Years, and Premiſſes; and that *dicta Præmiſſa* then were, and ſo ſhall continue diſcharged from all former Grants and Incumbrances made by the Defendant, or the ſaid *Robert Fiſh*, and alledgeth that *Robert Fiſh*, before the Aſſignment to the Defendant, had granted ſeveral Parts to ſeveral Perſons for Twenty Years, and ſo a Breach. The Defendant pleads, and confeſſeth the Bill of Covenant, and ſaith that *Robert Fiſh* granted his Intereſt in the Lands, (excepting the Lands ſo ſeverally demiſed;) and the Doubt was, whether it ſhall be intended he was Owner of the Term only, or the Term to him aſſigned, and of the entire Land, during the Term or not.

Whether one is Owner of the Term general, or the Term to him aſſigned.

Per Cur', the Word, *Premiſſes*, which were to be diſcharged of all Incumbrances made by the Defendant, or *Robert Fiſh*, tend as well to the Land as to the Term; and the Word, *Premiſſes*, need not to have been put in, if it intended only to have the Term granted to the Defendant to be diſcharged, 1 *Anderſon* 236. *Onely* and *Fiſh.*

Premiſſes extend to the Land and Term.

Covenant

Covenant was, That the Plaintiff ſhould have, hold, and enjoy the Lands, acquitted from all Charges and Incumbrances; and for Breach ſhews, there was a Rent-charge granted by the Predeceſſor, under whom the Defendant claimed, which is yet undiſcharged. The Defendant demurred, becauſe the Acquittal goes to the having and holding the Land, and it's not ſhewed that the Plaintiff was ever in Poſſeſſion, nor that he was charged or endamaged. To which, *Twiſden* and *Keling* agreed; but *per Windham*, the Defendant ought to ſhew how he had diſcharged and acquitted him from the very Rent, and not to let it perpetually hang over him; but by all the Court, if the Acquittal refer to the Land it ſelf, or to the Perſon, the Defendant muſt ſhew how, 1 *Keb.* 927. *King* and *Standiſs.*

If the Acquittal refer to the Land, or to the Perſon, he muſt ſhew how.

A Condition to diſcharge a Meſſuage of all Incumbrances: There one may plead generally, that he did diſcharge it of all Incumbrances; but if it be to diſcharge it of ſuch a Leaſe, he muſt ſhew how, 1 *Brownlow* 63.

If *A.* grant Lands to *B.* and his Heirs, rendring 10 *l.* Rent, and *B.* doth ſell the Land to *C.* and his Heirs, and doth covenant with *C.* that from ſuch a Day he ſhall enjoy it diſcharged of all Incumbrances, and before that Day a common Recovery is had againſt *C.* in which *A.* is vouched, and this is to the Uſe of *C.* and his Heirs, ſuppoſing hereby that the Rent had been gone, which is not ſo; in this Caſe the Covenant is broken, for this Rent is an Incumbrance, *Hill.* 20 *Jac.* C. B. *Greenway* and *Tuckfald*, *per Cur'*.

Kidwelly was ſeiſed, and leaſed for Years to *J. H.* Husband of *Iſabel*, and *J. H.* being ſo poſſeſſed by his Will, deviſed that the ſaid *Iſabel* ſhould have the Uſe and Occupation of the ſaid Lands for all the Years of the ſaid Term as ſhe ſhould remain ſole; and if ſhe died or married, that then his Son ſhould have the Reſidue of the ſaid Term not expired. *J. H.* died, *Iſabel* entered, to whom the ſaid *Kidwelly* conveyed by Feoffment the ſaid Lands in Fee, and covenanted, that the ſaid Lands from thence ſhould be clearly exonerated *de omnibus prioribus Barganiis, Titul', Juribus, & omnes aliis oneribus quibuſcunque. Iſabel* married, and the Son entered. *Per Cur'*, this Poſſibility which was in the Son at the Time of the Feoffment, tho' it was not Actual, yet the Land was not diſcharged of all former Rights, Titles, and Charges; by the Marriage of the ſaid *Iſabel* it is become an actual Charge, and the Term is not extinct by the Acceptance of the Feoffment, 1 *Leon.* 92. *Rot.* 120. *Hamington* and *Rydear.*

Where Term not extinct by an Actual Feoffment.

I am bound in a Statute, and afterward ſell my Land with Covenant *prout ſupra*, here the Land is not charged; but if the Condition in the Defeaſance be broken ſo as the Coniſee extends, now the Covenant is broken, *ibid.*

Subſequent Charge.

Two Leſſors covenant to diſcharge the Leſſee of all Incumbrances done by them, or any other Perſon; One of the Leſſors had made a Leaſe, and ſo a Breach; it's a good Breach: The Covenant goes to Incumbrances done ſeverally as jointly, *Pop.* 200. *Sanders* and *Meriton*, *Latch.* 161. *meſme* Caſe, & *Noy.* 86.

One

One deviſeth his Land to his Heir, paying a Rent-ſeck of ſo much *per Annum* to his Siſter after his Death without Iſſue. Deviſor dies; Deviſee ſells the Lands, and covenants, that it's free of all Rents, Incumbrances, *&c.* Now ſhe had no Remedy for this Rent-ſeck, becauſe ſhe had no Seiſin, and then the Covenant is ſo remote and uncertain. *Per Cur'*, it is expreſly within the Word, *Rents*; but had it been only Incumbrances, it might have been a Queſtion, 2 *Sid.* 167. *Milway* and *Medman.*

Rent-ſeck expreſly within the Word, *Rents.*

Incumbrances.

Maſon leaſed certain Lands to *R.* for Years, and afterwards leaſed them to one *Tinter* for Years; *Tinter* covenanted with the Defendant, That if the ſaid *R.* ſhould ſue the ſaid *Maſon* by Reaſon of the latter Leaſe, that then he would diſcharge and keep harmleſs without Damage the ſaid *Maſon*, and alſo would pay to him all the Charges that he ſhould ſuſtain by Reaſon of any Suit to be brought againſt *R.* in reſpect of the ſaid former Leaſe: And *Maſon* by the ſaid Indenture covenanted with *Tinter*, that the ſaid Land demiſed ſhould continue to the ſaid *Tinter*, diſcharged of former Charges, Bargains, and Incumbrances. And now upon the ſecond Covenant, *Tinter* brought an Action of Covenant, and ſhewed, that the ſaid *R.* had ſued him in an *Ejectione Firme*, upon the ſaid firſt Leaſe, and had recovered againſt him and *Maſon*; pleaded in Bar the ſaid ſecond Covenant, intending that by that latter Covenant the Plaintiff had Notice of the ſaid former Leaſe made to *R.* ſo as the firſt Leaſe ſhall be excepted out of the Covenants of former Grants, for otherwiſe there ſhould be Circuity of Action. *Per totam Cur'*

Covenant to Diſcharge, where goes to the Land, and where to the Poſſeſſion.

contra, for the Covenant of *Maſon* ſhall go to the Diſcharge of the Land, but the Covenant of *Tinter* only to the Poſſeſſion, 3 *Leon.* 123. *Maſon*'s Caſe.

Foſter and *Wilſon* againſt *Mapps. Intr. Trin.* 32 *El. Rot.* 71. *B. R.*

Breach as to not ſaving harmleſs, and ſhews not Diſturbance by Title or Tort.

Upon ſpecial Verdict the Caſe was, That the Defendant made a Leaſe of the Parſonage of *B.* and that he covenanted to ſave the Plaintiff harmleſs and indemnified, and alſo the Premiſſes and the Profits of it, againſt one *Ph. Blunt* the Parſon of *B.* and upon this the Plaintiff brought Covenant againſt the Defendant, and aſſigns a Breach, that the ſaid *Blunt* had entered and ejected the Plaintiff; and it was objected for the Defendant, that the Plaintiff doth not ſhew that *Blunt* entered by Title, and then it ſhall be taken that he entered by Wrong, and ſo the Covenant not broken; for to ſave harmleſs, is only of lawful Harms, as in *Puttenham*'s Caſe, *Dier* 306. *Puttenham* was condemned for Default in a *Scire fac'* in *Chancery*; upon Recogniſance there, the Court commanded the Warden of the *Fleet* where *Puttenham* was in Ward, for other Cauſes, and him to detain in Execution upon the Condemnation aforeſaid; the Warden takes a Recogniſance of *Puttenham* to ſave him harmleſs againſt every one, and ſuffers him to eſcape; the Coniſee ſues the Warden for the Eſcape, who imparles, and ſues *Puttenham* upon the Recogniſance; Iſſue *non damnificatus*. *Per Cur'*, he is not damnified, becauſe he was not by Law chargeable for the ſaid Eſcape, for *Puttenham* was never lawfully in Execution to the Plaintiff for the ſaid

ſaid Debt, becauſe a *Capias* doth not lie for Execution on a Recogniſance in *Chancery*; but the Councel for the Plaintiff in the ſaid Caſe of *Foſter al' contra*, for there is a Difference where the Covenant is general, and where ſpecial; and here, in as much as it is ſpecial to ſave harmleſs againſt *Ph. Blunt*, he ought to defend againſt him, be his Entry by Title or by Tort; and he cited *Catesby's* Caſe, *Dier* 328. Leſſor covenants, that the Leſſee ſhall enjoy his Term, *ſine Ejectione vel Interruptione alicujus*; Leſſee brought Covenant, becauſe a Stranger entered, and ſaith not that he had Title, and Judgment *pro Quer'*. *Gaudy*; the Covenant is broken, for if *Blunt* diſturbed him ſo that he could not take the Profits, it's a Breach, be it *per* Tort or Title, 2 *Ed.* 4. 15. If the Covenant be to warrant the Land, that is only upon Title; but here, if the Leſſee be *per* Tort or Title ouſted for to ſave harmleſs, is ſtronger than to warrant: And *per Cur'*, the Covenant is broken; they agree, that *Catesby's* Caſe is not like this. *Fenner* vouched, 18 *Ed.* 4. 27. where *H.* is bound to ſave *J. S.* harmleſs againſt me. If I arreſt *J. S.* altho' it is tortious, the Bond is forfeit; which the other Juſtices denied to be Law, 1 *Crok.* 212, 213. *Owen*, *p.* 100, 101,

Difference where the Covenant is general, and where ſpecial, as to ſaving harmleſs, *&c.*

A. covenants with *B.* before ſuch a Feaſt to make a good, ſure, ſufficient, and lawful Eſtate in Fee-ſimple, of and in the Mannor of, *&c.* diſcharged of all former Sales, Bargains, Charges and Incumbrances whatſoever, (Leaſes or Grants of Life, Lives, or Years, upon which the ancient and accuſtomable Rent, or more, are reſerved and payable, during ſuch Eſtates only excepted.) If a Leaſe for Years, with the accuſtomable

Rent reſerved of the whole Mannor, or any Part made mean, between the Date of the Indenture of Covenant and the Delivery of the Deed, be a Breach? Q. for Three were againſt Two, *Dier* 139. Earl of *Huntington* and Lord *Clinton*.

Coniſee of a Statute extends and aſſigns it to one, and after grants the Land to another, and covenants, That notwithſtanding any Act by him, or any other by his Conſent, that the Statute Extent and Execution ſhall be in force; and in Covenant this Aſſignment was aſſigned for Breach, and upon Demurrer adjudged for the Plaintiff, and in a Writ of Error this Judgment was reverſed, for notwithſtanding the Aſſignment, the Statute is in force; but if the Plaintiff *eo quod conceſſit* to him, which implies a Covenant, the Action had been maintainable; but the Breach is aſſigned in the Covenant only, which is not broken by the Aſſignment, for the Statute is in force after the Aſſignment, ſo that the Coniſee may releaſe; but if he had covenanted, that the Grantee ſhall hold without Diſturbance, the Aſſignment had been a Breach of Covenant in the Law, implied in the Word, *Grant*, if the Action had been brought upon it, *Palmer* 388. *Perſon's* Caſe.

Notwithſtanding an Aſſignment the Statute is in force.

Covenant not broken by the Aſſignment.

Grant.

CHAP.

CHAP. XXXII.

Covenant that he had lawful Right and Title to let.

THE Defendant lets the Mannor of *S.* by Indenture for Ten Years, and covenanted, that he had lawful Right and Title to let it for that Term; Breach aſſigned, that he had not Right nor lawful Eſtate to let it, and ſo broke his Covenant. It is well aſſigned, tho' it is not ſhewed he had an Eſtate, nor how the Leſſor had any Right, or that a Stranger had evicted him by Title, for the Covenant being general, the Breach may be aſſigned as general as the Covenant, and it lies not in the Plaintiff's Notice who had the rightful Eſtate; but the Defendant ought to have maintained, that he was ſeiſed in Fee, and had a good Eſtate to demiſe, and then the Plaintiff ought to have ſhewed a Special Title in ſome other, *Cr. Jac.* 304. *Salmon* and *Bradſhaw*, 9 *Rep.* 60 *b. meſme* Caſe, & 1 *Cro.* 176. *Simms* contra *Smith*. *Aliter*, in Debt upon an Obligation, with Condition to perform Covenants, 1 *Cro. ibid.*

Bargainor covenants, that he is ſeiſed of a good, perfect, and indefeaſible Eſtate in Fee, and that he had good Authority to ſell, and that there is not any Reverſion in the Crown by any Act made by him: The Qu. was, If theſe Words, [*by any Act done by him,*] ſhall refer to all? *Per Cur'*, not, but only to the laſt Clauſe.

Covenant

Covenant or Condition, before *Michaelmas*, to make, acknowledge, and ſuffer, *&c.* all and every ſuch reaſonable Acts and Things, whatſoever they be, for the lawful aſſuring, ſure making, of the Mannor of *D.* to *J. S.* and his Heirs; Defendant pleads, That before *Michaelmas* the Plaintiff *rationabilit' non requiſivit le Deft' ad faciend'*, &c. *aliqua rationabilia actum & acta quæ forent pro bona & legitima Aſſurancia* of the Mannor. Plaintiff replies, *quod* ſuch a Day before *Michaelmas* he requeſted. The Defendant, *quod ipſe conveyaret & aſſuraret Manerium de D.* to *J. S. ſecundum tenorem Conditionis (conventionis) præd'*; found *pro Quer'*. Moved in Arreſt, that no ſufficient Breach was found, for the Plaintiff ought to have required an Aſſurance in certain, *(viz.)* Feoffment, Fine, *&c.* The Condition being ſpecial, all and every Act, *&c. Sed non allocatur*, the Iſſue is good, and the Condition is broken, for by the Condition the Defendant is to do all and every Act whatſoever; ſo that if the Plaintiff requeſt a Fine, or, *&c.* then when the Plaintiff requeſted to convey the Mannor in generalty, the Defendant ought at his Peril to do it by ſome kind of Aſſurance; and if he makes a Feoffment, yet if after the Plaintiff requeſt a Fine, *&c.* he muſt do it, *Yelv.* 44. *Pudſey* and *Newſham*, 1 *Brownl.* 84. & *Moo.* 682. *meſme* Caſe.

A general Requeſt to convey, how expounded.

A Leaſe was made for Life by Baron and Feme, and the Covenant was, That he ſhould make ſuch reaſonable Aſſurance as the Councel of the Leſſee ſhould adviſe: The Councel adviſed a Fine with Warranty by Baron and Feme, with Warranty againſt the Husband and his Heirs; it was moved it was not a reaſonable Aſſurance, becauſe the Warranty

A Fine adviſed with Warranty, good.

Warranty did reach to other Land; but the Court over-ruled it, and ſaid, it is the ordinary Courſe in every Fine to have a Warranty, and the Party may rebutt the Warranty, *Godb.* 435. *God* and *Winch*'s Caſe, *Latch.* 186. *Tindal*'s Caſe.

To make an Aſſurance, binds not to releaſe with Warranty, 2 *Leon.* 120. *Q. le Liver.*

Covenant to aſſure ſuch Land by *reaſonable Aſſurance*, as by the Plaintiff ſhould be adviſed and required; who deviſed and required an Indenture of Feoffment, with Covenant, to ſave and diſcharge him of all Incumbrances made by the Defendant, and for further Aſſurance, and for not ſealing this Aſſurance the Action is brought. *Per Cur'*, on Demur to the Declaration, tho' theſe Covenants are ordinary and reaſonable, yet the Agreement not being to make it with reaſonable Covenants, but only reaſonable Aſſurance, he is not bound to ſeal it, for it is not any Part of the Aſſurance, and an Aſſurance may be without Covenants, *Cr. Jac.* 571. *Coles* and *Kinder*, *Raymond* 190. & 1 *Sid. Quære.* *Reaſonable Aſſurance.*

CHAP.

CHAP. XXXIII.

Covenants relating to Apprentices.

By what Covenants Apprentices are bound, though under Age.

INfant, by Cuſtom of the Lands, may bind himſelf Apprentice by Indenture, and it ſhall be good. 2 *Bulſt.* 192.

Covenant brought by Apprentice.

Action of Covenant was brought by an Apprentice, and aſſigns for Breach, That the Teſtator of the Defendant had covenanted to inſtruct the Plaintiff in the Art of a Sadler for 7 Years, and to find him Meat and Drink during this Term; and that the Defendant, after the Death of the Teſtator, did put the Plaintiff out of his Houſe, and ſo kept him from Meat and Drink. It was agreed, That *& ſic* is a ſufficient Averment of the Breach, and that it is not but Matter of Form: And as for the Law, the Opinion of the Court was, That the Apprentice remains an Apprentice to the Executor; for though he cannot inſtruct him, yet he may find him Meat and Drink, *&c.* *Per Hide*, this general Covenant to inſtruct is not gone by his Death, though there be no particular Cuſtom, as in *London*, eſpecially ſince the Statute 5 *Eliz.* 1 *Sid.* 216. 1 *Keb.* 761, 820. *Wadſworth* and *Eye*.

Covenant to inſtruct, if diſcharged by Death.

Co-

Covenant, by Infant *per Gard. ſuos*, for that he was bound Apprentice to the Defendant by Indenture, and he did keep him with Meat; and Defendant pleads, he was a Citizen and Freeman of *Briſtol*, and that at the General Seſſions of the Peace it was ordered, that he ſhould be diſcharged from his Maſter for diſorderly Living, and this Order enrolled by the Clerk of the Peace. *Per Cur'*, *præter Hales*, they had Power to diſcharge him; and it is frequent at Seſſions ſo to do. 1 *Ventr.* 174. *Watkins* and *Edwards*.

Diſcharged at Seſſions pleaded.

Procter and *Burdet*'s Caſe was, 3 *Mod.* 69. Action of Covenant brought by Apprentice. The Maſter covenants to find and allow the Plaintiff Meat, Drink, Lodging, *& alia Neceſſaria*, during ſuch a Time, and the Breach was as general as the Covenant, *viz.* That he did not find him Meat, Drink, Lodging, *& alia Neceſſaria*. The Plaintiff had Judgment by *nihil dicit*, and on Enquiry entire Damages were given againſt the Defendant; Error was brought, That the Breach is too general, and entire Damages were given, amongſt other Things, for *alia Neceſſaria*, and doth not ſay for what; and in 2 *Cro.* 436. *Aſtell* and *Mill*'s Caſe, Judgment was reverſed for that Reaſon, but that Caſe has ſince been adjudged not to be Law; a Breach may be aſſigned as general as the Covenant. *Curia*, in a *quantum meruit*, they formerly ſet out the Matter at length, but now it is in general Words, [*Pro diverſes aliis bonis*,] and held good: There are indeed many Inſtances where Breaches have been generally aſſigned, and held ill; that in *Croke* is ſo, but the latter Opinions are otherwiſe, *affirmetur judicium*.

Breach may be aſſigned as general as the Covenant.

Covenant

Covenant againſt Apprentice.

Covenant was brought againſt an Apprentice on Indenture. Defendant pleads, he was within Age; the Plaintiff in his Replication maintain'd his Action by the Cuſtom of *London*, That he may bind himſelf at the Age of 14: The Queſtion in 4 *Leon. p.* 77. and in *Cro. Eliz. Walker* and *Nicholſon*'s Caſe, was, Whether this was Departure in Pleading? and it was much doubted there, and the Caſe in 19 *R.* 2. was cited; how that an Infant brought an Action againſt his Guardian in Socage; who pleaded, That the Plaintiff was within Age; the Plaintiff did maintain his Declaration, That by the Cuſtom of ſuch a Place, an Infant of 18 Years might bring an Account againſt his Guardian in Socage; and it was held it was no Departure: So it was much argued in *Bold* and *Wallis*'s Caſe, 14 & 15 *Car.* 2. *B. R.* becauſe he brought his Action as at Common Law generally, and maintain'd it by a Cuſtom. Some argued, That it was a Departure, and cited 1 *Inſt.* 304. & *Keb.* 76. Abbot of *Buckface*'s Caſe. It ſeemed to be agreed by all the Court, That where one alledgeth a general Cuſtom in a Count, and replies by a Special Cuſtom, that this is not good; but by *Windham*, this is no Departure in the principal Caſe, being no Matter varying from the Count, that being but ſuppoſal, and always general; this Special Matter is a good Support, and that this is no Departure from the Title, but an Anſwer to a Diſability pleaded in Bar. *Foſter* held it to be no Departure, the gift of the Action being laid in *London*, and the Title

Departure in Pleading.

Title is the ſame ſtill, only the Perſon enabled, *Winch* 63. But by *Twiſden*, all the Precedents are to Count on the Cuſtom, as being the Ground of the Action; and he was of Opinion, That it was a Departure, but the Court gave Leave to the Plaintiff to diſcontinue his Action, and to declare on the Cuſtom of *London*, that an Infant may bind himſelf.

Covenant; Plaintiff declared, That the Defendant, by his Deed ſhewed in Court, did covenant to ſatisfy the Plaintiff all ſuch Sums of Money as *J.* his Son, the Plaintiff's Apprentice, ſhould imbezel from him, within 3 Months after Requeſt, and then lays the imbezelling and Requeſt, *&c.* The Defendant prays Oyer of the Deed, which was entered *in hæc verba*; and there the Covenant was to ſatisfy within 3 Months after Requeſt, and due Proof made of ſuch imbezelling. The Iſſue was, Whether he imbezelled? and found *pro Quer'*. Judgment was arreſted, becauſe it appears by the Entry of the Deed, that the Plaintiff ought not to have brought this Action until the 3 Months were incurred, as well after Proof, as after Requeſt: Whereas the Plaintiff had averred no Proof in the Declaration, and the Word [Proof] generally laid, ſhall be underſtood Proof Judicial, by Jury, Confeſſion or Demurrer in Court; but if the Form of Proof were by Writing otherwiſe appointed, that ſhall prevail, as by Witneſſes before Two Aldermen, by Certificate, *&c.* which Proof ſhall be ſet down in the Plea, with all the Circumſtances, and then it ſhall be in the Diſcretion of the Court, whether the Proof were competent according to Meaning of the

[Proof] how to be made.

Writing; but in this Caſe, Proof may be made in Court judicially, in Action brought againſt the Apprentice, before the Action brought on the Covenant, made by another; and ſo it may well be taken for Proof by Trial in Court. *Hob.* 217. *Crockhas* and *Woodward.*

Collateral Covenants ſhall not bind an Infant, as in Action of Covenant brought againſt the Infant, on Covenant to ſerve his Maſter faithfully, as an Apprentice, in the Myſtery of a Draper; and he lays in the Action, That he defrauded him of his Goods. *Per Cur'*, the Statute 5 *Eliz.* is not ſo ſtrong againſt Infants as to make collateral Covenants good. Infant is not bound by thoſe Words at Common Law, and no collateral Covenant ſhall be maintainable upon that Statute. Action on the Caſe lies on the Covenant in Law, but not on the Covenant in Fact, and for that he ought to have collateral Security; and the Retainer is, for the Benefit of the Infant to learn his Trade, but the Covenant is to his Diſadvantage; but *Winch* thought the Covenant to be good, being incident to the Retainer. There is no Remedy but by Action on the Caſe. *Winch* 63. *Flemming* and *Pitman.* Vide *Hetl.* 63.

Collateral Covenants not to bind an Infant.

Covenant was brought upon Indenture of Apprentiſhip, containing the uſual Covenants in ſuch Indenture, and he ran away with his Maſter's Money in *London*; and Two Exceptions were taken to the Declaration:

1. In the Indenture, the Words are, That the Infant ſhall be Loyal and Faithful, *& ſecreta ſua velare, &c.* without any Words of Co-

Covenant expreſs; but it was reſolved, That the Words imply a Covenant.

2. It was excepted, That Infants ſhall be bound by Covenant, is pleadable no where but in *London*; (the Cuſtom is, That Infant ſhall not wage his Law upon Covenant for Tabling) *Sed non alloc'*, it is pleadable at any Place. This Covenant is allowable at Law, and the Words of the Statute are, That the Covenants ſhall become of ſuch Effect and Efficacy, as if he had been at full Age at the Time of the Sealing the Indenture, and then he ſhall be bound in every Place within the Realm. The Court ſeemed to be of Opinion, That the Action was well brought. *More* 138. *Stanton*'s Caſe. 1 *Raym.* 60. and 1 *Lev.* 81. *Mould* and *Wallis*. Cuſtom of *London*.

Covenant againſt an Executor upon the Covenant of the Teſtator, to teach an Apprentice his Trade. It was moved, That this Covenant was Perſonal to the Teſtator, and binds not the Executors, but only binds the Maſter, during his Life, to teach him. But *per Cur'*, it binds the Executors alſo, and they ought to ſee the Apprentice taught his Trade; and if they are not of the Trade, they ought to aſſign him to another, who is of the Trade. 1 *Lev.* 177. *Walker* and *Hull*.

CHAP. XXXIV.

Actions.

COvenant was brought againſt Two, and the Writ was, *Quod teneat Conventionem*, and it was amended, though in an Original Writ. 2 *Vent.* 173. *Coke* and *Romney*.

Unreaſonable Bail.

The Writ was Damages 30000 *l.* That the Party ſhould not put in Bail. *Per Cur'*, it's a great Abuſe, though in Covenant no Fine is due, nor in Debt: If the Party be committed, they will force the Plaintiff to take reaſonable Bail, according to Direction; and if the Plaintiff declare of a leſs Sum, they will lay him by the Heels, and the Plaintiff ought to ſwear the probable Cauſe of Action to be of ſuch Value. 1 *Keb.* 470. Sir *J. Cutler*'s Caſe.

Action how often on Breach of a Covenant.

In Covenants perpetual, if they be once broken, and an Action of Covenant brought, and Recovery upon it, if they be afterwards broken, a *Scire fac'* ſhall be had upon the Judgment, and the Plaintiff need not to bring a new Writ of Covenant. *Cr. El. p.* 3. *Swan*'s Caſe.

Covenant to pay 40 *s. per Ann.* during 21 Years; he may have ſeveral Actions of Covenant for every Time it is behind, and ſo every Year a new Action. *Godb. p.* 12. 1 *Brownl.* 19, 20.

1 *Inſt.* 292. To pay Money at 5 ſeveral Days, at the firſt Day Covenant lies after Failure.

If

If a Man grants Rent to another, payable at a certain Day, and covenants to pay the Rent accordingly; if the Grantee after recover in an Action of Covenant for Non-Payment of the Rent, this ſhall be a Bar of any Action after for the Rent, for in the Action of Covenant he ſhall recover all the Rent in Damages. 1 *Rol. Abr.* 353. *Strong* and *Watts.*

If Grantee recover in Action of Debt for Rent, it is a Bar of another Action for the Rent.

J. covenants within a Year to ſuffer a Common Recovery, and all the Terms are paſt without any Recovery ſuffered; yet no Action lies upon that Covenant until the Year be fully expired, though the Terms being paſs'd it is impoſſible to ſuffer any Recovery within the Year and Time prefix'd. 4 *Leon.* 170.

A. covenants with one, his Heirs and Aſſigns, for Enjoyment, and this is touching an Eſtate of Inheritance. *Per Cur'*, the Eviction being of the Teſtator, he cannot have Heir or Aſſignee of this Land, but the Damages ſhall be recovered by the Executor, though not named in the Covenant, for they repreſent the Perſon of the Teſtator. 2 *Lev.* 26. *Lucy* and *Levington.* 1 *Vent.* 175. 2 *Keeble* 831. *Id. Caſus.*

Leſſee covenants with the Leſſor, his Executors and Adminiſtrators, to repair, and leave in Repair, at the End of the Term; and for not leaving in Repair at the End of the Term, the Heir brings the Action of Covenant, and good. It is a Covenant that runs with the Land, and ſhall go to the Heir, though not named. 5 *Rep. Spencer's* Caſe. And it appears, the Intent was to have it continue after the Death of the Leſſor, being with him and his Executors, and

Where the Heir ſhall have Covenant.

therefore it determines not by his Death. 2 *Lev.* 92. *Loughter* and *Williams*'s Caſe, *in Scac'*.

Who ſhall have Action of Covenant, or not.

If Indenture of Charter-Party be made between one *A.* and others, Owners of the Ship called *E.* whereof *B.* is Maſter, of the one Part, and *C.* of the other Part; in which Indenture *A.* covenants with *C.* and *C.* covenants with *A.* and *B.* and binds them to *C.* and *B.* for Performance of Covenants in 600 *l.* and the Concluſion of the Indenture is, [In Witneſs whereof, the Parties aboveſaid have put their Hands and Seals]; and the ſaid *B.* to the ſaid Indenture, puts his Hand and Seal, and delivers it. In this Caſe, *B.* is not Party to the ſaid Indenture; ſo that *B.* cannot releaſe the Action brought upon this Indenture by *A.* for that this is an Indenture Reciprocal between Parties of the one Part, and Parties of the other Part; in which Caſe no Obligation, Covenant or Grant, may be made with any that is not Party to the Deed, but where the Deed indented is not reciprocal, but without the Words, [between, *&c.*] as *omnibus Chriſti fidelibus, &c.* there an Obligation, Covenant or Grant, may be made to divers ſeveral Perſons. *Coke* 2 *Inſt.* 673. 2 *Lev.* 74. 3 *Lev.* 139.

One that is not Party, tho' he ſeal.

If Indenture of Charter-Party be made between *A.* and *B.* Owners of a Ship of the one Part, and *C.* and *D.* Merchants, of the other Part, and there are ſeveral Covenants of the one Part, and of the other, and *A.* only ſeals the Indenture of the one Part, and

C. and

C. and *D.* of the other Part; but through the whole Indenture it is mentioned, That *A.* and *B.* covenant with *C.* and *D.* and *C.* and *D.* covenant with *A.* and *B.* In this Caſe, *A.* and *B.* may join in an Action againſt *C.* and *D.* upon this Indenture, for Breach of a Covenant in the Deed, although that *B.* never ſealed the Deed, for he is Party to the Deed, and *C.* and *D.* had ſealed to other Part to *B.* as well as to *A.* Upon which the Action is brought. 2 *Rol. Abr. Clement* and *Henly.*

One, though he never did ſeal the Deed.

O. C. ſeiſed in Fee of a Meſſuage, and poſſeſs'd of a Leaſe for divers Years yet enduring, let to the Defendant for 10 Years, and wherein the Defendant covenants to Repair, and by a Deed he granted to the Plaintiff the Reverſion in Fee, and by another Deed the Reverſion for Years. Now tho' he hath Two Reverſions, the one in Fee, and the other for Years, granted by ſeveral Deeds, and at ſeveral Times, yet he may have one Action of Covenant. *Cro. Jac.* 329. *Pyot* and the Lady *St. John.* 2 *Bulſt.* 112. *Id. Caſus.*

One Action of Covenant upon Two Reverſions.

If a Man demiſe Land to a Woman for Years, and the Leſſor covenants with the Leſſee to repair the Houſes during the Term, the Wife takes Husband, and dies, the Husband ſhall have Action of Covenant, as well upon the Covenant in Law, on theſe Words, [Demiſe or Grant,] as upon expreſs Covenant. 5 *Rep.* 17. *a.*

By Baron on a Leaſe to the Feme.

The ſame Law is of a Tenant, *per Stat. Merch'* or *Staple*, or *Elegit*, of a Term, and he to whom the Leaſe is ſold, by force of any Execution, ſhall have Action of Covenant

By Tenant, by Statute or *Elegit.*

in ſuch Caſe as a Thing annexed to the Land, although they come to it by Act in Law. *Ibid.*

In *London* a Man ſhall have Covenant without Deed, by the Cuſtom. *N. B.* 146.

Debt on an Obligation: The Words of the Obligation were, [I am content to give to *W.* 10 *l.* at *Michaelmas*, and 10 *l.* at *Lady-Day*:] It's a good Obligation, and amounts to as much as I promiſe to pay; and an Action of Covenant lies upon it, as well as Debt, at the Election of the Plaintiff: And though the Action is 20 *l.* and the Declaration is 10 *l.* and 10 *l.* at Two ſeveral Days, yet it's good enough, and the Declaration well, purſuant to it. 3 *Leon.* 119.

What Words amount to Debt or Covenant.

Debt for 15 *l.* 18 *s.* 6 *d.* and declares on a Deed, reciting, That divers Suits were between the Vicar of, *&c.* and the Plaintiff, touching a *Modus Decimandi*, which *Modus* concerns all the Pariſhioners. Defendant, a Pariſhioner, agrees, and promiſeth, with the Plaintiff, to pay his proportionable Part of all Charges of the ſaid Suit, and other Suits touching this Matter; and that the Plaintiff had expended 350 *l.* and the Defendant's Share came to 15 *l.* 18 *s.* And whereof he had Notice, *& licet requiſitus*, had not paid it. Upon *non eſt factum*, Verdict *pro Quer'*. It was moved in Arreſt, that Debt lies not on this Agreement, it being not certain what the Sums to be paid ſhall be, but Covenant; but *per Cur'*, for when the Damages which were at firſt uncertain, are by Averment reduced to a Certainty, Debt lies as well as Covenant. 3 *Lev.* 429. *Sanders* and *Mark.*

Oyer.

Oyer. Vide *Monſtre des faits.*

In Action of Covenant, the Defendant demands no *Oyer*, but pleads, in *Articulis illis ulterius continuetur, &c.* which, *per Cur'*, is ill, and his ſhewing the Counter-Part is not ſufficient, but the whole Indenture ought to be in Court. 1 *Keb.* 513. *Prieſtland* verſus *Cooper.*

In Action of Debt, the Defendant pleaded it was for Performance of Covenants, and that he hath performed all, not ſhewing forth the Indenture. Plaintiff demurred. *Per Cur'*, he muſt ſet it forth, and gave this as a Rule in the Action depending. 1 *Keb.* 415. 1 *Sid.* 97. *Lewis* and *Bull.*

Note, In Debt on Bond, for Performance of an Award or Covenants; if Money be awarded or covenanted to be paid of Value, Special Bail is required: Otherwiſe, if it be to do any Act that is in it ſelf uncertain, as to have Trees, common Bail is only required. 1 *Keb.* 450.

In what Caſe one cannot have Action of Covenant, not being Party to the Deed.

Debt on a Charter-Party, indented of Affreightment made by *Benly*, Maſter, and Partener of a Ship; by which he, by the Conſent of *Cooker*, the other Part-Owner, let the Ship to the Defendants for a Voyage, and for which the Defendant covenants to pay ſuch Sum to *Benly*, as Maſter; and covenants with the ſaid *Benly*, and alſo with the ſaid *Cooker*, to pay to *Cooker* 300 *l.* and for Non-

Non-Payment, *Cooker* brings the Action. Defendant demands *Oyer* of the Indenture; which is entered thus, [This Indenture Charter-Party witneſſeth, That *Benly*, Maſter, and Part-Owner of the Ship, with the Conſent of *Cooker*, the other Part-Owner, let the Ship, and then the Covenant's *ut ſupra*;] and then the Defendant pleads, he only, and *Benly* were Parties, and ſealed and delivered the Charter-Party, and the Plaintiff was no Party. Plaintiff demurs, for this is not an Indenture between the Parties, but all one as if a Deed-Poll; by which he may covenant with a Stranger, not being between *Benly* of the one Part, and the Defendant of the other Part; in which Caſe, none but who was Party might have brought an Action on the Deed: But here being as a Deed-Poll, he may covenant with divers Perſons to do ſeveral Acts, for which each one ſeverally ſhall bring his Action. 2 *Inſt.* 673. Of this Opinion was all the Court. 2 *Lev.* 74. *Cooker* and *Child*. Judgment *pro Quer'*. 3 *Keeble* 94. *Id. Caſus.*

In ſome Caſes a Stranger, to the Covenant, ſhall maintain an Action againſt the Covenantor.

Two Coparceners made Partition, and one covenanted to acquit the other of a Suit, occaſioned by the Land ſo divided; the Covenantee aliened it: The Opinion in 1 *Inſt.* 385. *a.* That the Alienee, who is a Stranger to the Covenant, ſhall maintain an Action againſt the Covenantor, becauſe the Acquittal runs with the Land.

When

When the Action ſhall be brought.

Defendant by Bill ſealed, promiſed and agreed to pay to the Plaintiff *Annuatim* 5 *l.* for 5 Years, at Two Payments in the Year; Covenant lies, if it be not paid the firſt half Year; *aliter*, in Bill of Debt. 3 *Lev.* 383. *March* and *Freeman*. On ſeveral Payments.

A. covenants with *B.* to pay him 100 *l.* at 5 ſeveral Days; after the firſt Default, Action of Covenant lies, for they are ſeveral in their Nature. 1 *Inſt.* 292. *b.* 1 *Cro.* 807.

And there, if he bring Action after the firſt Breach, he ſhall have Judgment and Damages for the ſaid Breach; and at another Time, whenſoever there ſhall be another Breach, he ſhall have a *Scire fac'* on the ſaid Judgment. *Br. Sci fa'*, 218.

If *A.* recover by Judgment upon a Compoſition, which is Executory from Time to Time, there he ſhall have a *Fieri fac'* of that which is incurred within the Year, and a *Sci' fac'* after. *Cytoſt, &c.* 23 *H.* 8. *Br. Exec'*, 119.

In Caſe of Covenant, for every Breach he ſhall have a new Action, as was held, *per Cur'*, in *Taylor* and *Foſter*'s Caſe, 43 *Eliz. B. R.* and in *Hugh*'s Caſe, *Rep.* 11, 12.

In

In what ſpecial Caſes Covenant lies.

Action of Covenant was brought, declaring upon a Deed, by which the Defendant *aſſignavit & tranſpoſuit* all the Money that ſhould be allowed by any Order of a foreign State to come to him in lieu of his Share in a foreign Ship; It was moved, that the Action of Covenant would not lie, becauſe it's neither an expreſs nor an implied Covenant: *Hales*, it is a good Covenant againſt the Party himſelf. If I will make a Leaſe for Years, reſerving Rent, to a Stranger, Action of Covenant will lie by the Party, for to pay the Rent to a Stranger; and if it were an Aſſignment for Maintenance, it ought to be averred it is a Covenant; it is all one as if he had covenanted, that he ſhould have all the Money that he ſhould receive for his Loſs in ſuch a Ship, 1 *Mod. Rep.* 113. *Deering* and *Farrington*, Judgment *pro Quer'*, 3 *Keeble* 304. *id. Caſus.*

Good Covenant againſt the Party himſelf.

Aſſignment for Maintenance.

It lies upon a *Conceſſit* of a Term in a Fine, altho' there is no Deed; and this too againſt a Feme Covert, 1 *Sid.* 466. *Wotton* and *Heale*, 1 *Mod.* 66. 1 *Lev.* 301. 2 *Sand.* 177. & 2 *Keb.* 684. *id. Caſus.*

On a *Conceſſit* in a Fine of a Term againſt a Feme Covert.

If *C.* recovers 10 *l.* againſt *A.* and *B.* comes to *C.* and ſaith, That if he will releaſe the 10 *l.* to *A.* that he will be his Debtor; and he accordingly releaſed the 10 *l.* to *A.* yet no Action of Debt lies, becauſe it ſounds in Covenant, 9 *H.* 5. 14.

No Action of Debt, becauſe it ſounds in Covenant.

In Covenant the Plaintiff declares, upon a Writing of the Defendant's Teſtator, acknowledging himſelf to be accountable to the Plaintiff for whatever Money the Plaintiff

tiff ſhould charge upon *J. S.* payable to Sir *Tho. Viner*: *Per Cur'*, it lies well, being againſt Executors; and had it been againſt the Party himſelf, *&c.* no Notice is given by the Plaintiff to *J. S.* who upon ſuch Bills was to pay to Sir *Tho. Viner*, and it's not neceſſary, 1 *Keb.* 155. 1 *Lev.* 47. *Brice* and *Curr.* Notice.

Whereas the Defendant recovered againſt him 7 *l.* 10 *s.* and for Coſts and Damages, and upon that Judgment, the Plaintiff paid to him 7 *l.* and the Defendant made unto him a Releaſe of that Judgment, and by his Deed covenanted, that he would withdraw all Proceſs of Execution for that Debt; that the Defendant intending unjuſtly to vex him againſt this Releaſe, and againſt his Promiſe in the ſaid Writing, ſued a *Ca' ſa'*, by which he was arreſted and detained in Priſon. Declaration is ill, he ought to have had an Action of Covenant, and not an *Aſſumpſit*, *Cr. Jac.* 505. *Bennus* and *E. Guildly*, *Hob.* 284. *Green* and *Harrington*. Where Action of Covenant lies, and not an *Aſſumpſit*.

To *Scire fac'* on a Judgment, Defendant pleads, That before the Judgment and hanging the Suit, the Plaintiff covenanted with him by the Deed now ſhewed, That if he obtained Judgment, and the Defendant on ſuch a Day paid unto him 100 *l.* that he would not ſue Execution, and the Judgment ſhould be void; and pleads, that he had paid the 100 *l.* accordingly, and demanded Judgment. Plaintiff demurred. *Per Cur'*, it is not any Plea, for he cannot make a Defeaſance of a Judgment before it be given, and they ſaid his Remedy is only by Writ of Covenant upon his Indenture, *Cr. El.* 837. *Gage* and *Sburland*. Where Remedy muſt be by Way of Covenant, and not by Plea.

Debt

Debt was brought upon this Deed; It is agreed, that *C.* ſhall pay unto *P.* 700 *l.* for *J. S.* his Houſe and Lands in *B. C.* may have Covenant againſt *P.* if he doth not convey the Lands, 1 *Sid.* 423. *Pordage* and *Cole*, ſee *Ray.* 183. 1 *Lev.* 274. 1 *Sanders* 319. and 2 *Keeble* 542.

Againſt the King's Leſſee.

A Writ of Covenant lies againſt the King's Leſſee upon a Patent of the King, tho' there is not any Counterpart ſealed by the Leſſee, who is to be charged; Sir *John Brett* and *Cumberland*, Leſſee by Letters Patents, is bound to Covenants, and ſo is his Aſſignee, 1 *Roll. Rep.* 359. 3 *Bulſt.* 163. 2 *Cro.* 399.

What ſhall be ſaid a Covenant on the Part of the Leſſee.

A Man made a Leaſe for Years, with Exception of divers Things, and that the Leſſee ſhall have *conveniens Lignum non ſuccidendo ſeu vendendo Arbores*; Leſſee cuts down Trees, Action of Covenant lies by the Leſſor, for it's a Covenant on Part of the Leſſee, becauſe this Law giveth him reaſonable Eſtovers, and by this Covenant he abridgeth his Privilege, *Marſh. p.* 9.

Eſtoppel.

A Leaſe by Eſtoppel is a good Leaſe to ground this Action upon Eviction, and to traverſe that he was not poſſeſſed by Vertue of a Leaſe, is no Plea againſt the Leaſe by Indenture, which is an Eſtoppel without ſhewing a particular Cauſe, *Cr. Jac.* 73. *Stiles* and *Herring*. Vide *Vaughan* 118. *Hayns* and *Bickerſtaff*.

Plead.

A Covenant upon a Charterparty for the Freight of a Ship; The Defendant pleaded, that the Ship was loaded with *French* Goods, which *French* Goods were prohibited by Law to be imported. On Demurrer, ruled no Plea, for the Court were all of Opinion, If the Thing to be done was lawful, at the Time when

A Thing to be done at the Time of the Covenant, and after prohibited *per Stat.*

when the Defendant did enter into the Covenant, tho' it was afterward prohibited by Act of Parliament, yet the Covenant is binding, 3 *Mod.* 39. *Braſon* verſus *Deane.*

In Covenant the Plaintiff declared, That the Defendant demiſed to him an Houſe, with the Uſe of a Pump, and he ſuffered it to be ſo out of Repair, that it became uſeleſs, and covenants, that he ſhall enjoy *dimiſſa Præmiſſa*, and aſſigns a Breach that he ſuffered *antliam præd' eſſe fractam & totalit' ſpoliat'*. Defendant demurs. *Keling*, *Mereton*, and *Rainsford*, held, that the Action did lie, the Uſe of the Pump being Part of the Thing demiſed; which Words make a Covenant, as in 4 *Rep. Nokes's Caſe*, 5 *Rep. Spencer's* Caſe. Uſe of a Pump.

If a Man let an Houſe, together with the Eſtovers to be taken of the Wood of the Leſſor, and afterwards the Wood is ſtubbed up, Covenant lies for the Leſſee. If a Parſon makes a Leaſe, and then reſigns, he is liable to covenant; and in this Caſe the Leſſee would be at a Miſchief, for he ſhould be a Treſpaſſer to enter and repair it, and this is an Ouſter as much as may be, where the Leſſee is poſſeſs'd. *Twiſden fortiter contra*, he may have Action on his Caſe, and ſo Remedy for his Damages; and he ſaid he might enter and repair, *quando aliquis concedit*, &c. He ſaid he never met with a Caſe where Covenant would lie but upon an actual Ouſter, either by a Stranger, who had an Eigne Title, or by the Leſſor himſelf: This is Nonfeaſance, and ſo he differenced it from the Caſe of Eſtovers, which was an actual Tort. In Covenant upon an *Ouſter* of a Term, if it be not incurred, Judgment muſt be to recover the Term it ſelf, *Fitzh. Na. Br.* 145.

which

which cannot be in this Caſe, for the Sherriff cannot put him into the Uſe of a Pump, 1 *Ventr.* 26. 44. *Pomfret* and *Rycroft*; Judgment *pro Quer'*. 1 *Sand.* 321. 1 *Sid.* 429. 2 *Keeble* 505. *id. Caſus.*

In what Caſes Covenant doth not lie.

In reſpect of the Words.

One made a Leaſe for Six Years; and Leſſor for covenants, That if he were diſpoſed to leaſe the ſaid Lands after the Expiration of the ſaid Term of Six Years, that the Leſſee ſhould have the Refuſal of it. Leſſor within the Six Years makes a Leaſe thereof to *J. S.* for 21 Years, to commence preſently. *Per Cur'*, the Covenant is not broken, becauſe it's out of the Words of the Covenant, *Godb.* 335. 2 *Rol. Rep.* 332. *Walter* and *Mountague.*

Covenant not broken, becauſe out of the Words.

One covenants to cauſe a Statute to be cancelled, and the ſame to be vacated upon the Payment of 10 *l.* before ſuch a Day, and at the Day he tendered the Statute to be cancelled, *&c.* but before that Time he had ſued Execution on the Statute. The ſuing of Execution before the Day is a Breach of Covenant, and an Action lies, for after Execution he cannot deliver up the Statute in the ſame Plight; yet an Action of Covenant doth not lie in this Caſe, but an Action on the Caſe, in as much as the Words before are Words of Defeaſance, and in the Preſent Tence, and a preſent Thing to be done; as if a Covenant be to ſtand ſeiſed to Uſes, or that one ſhall enjoy ſuch a Deed, no Action of Covenant lies, 1 *Sid. p.* 48. *Robinſon* and *Ampts*, 1 *Keb.* 103, 118. *Raymond.* 25.

Where Action of Covenant lies not, but an Action on the Caſe.

If

If a Man covenant to grant ſuch Eſtate to his Wife, or to leave her worth ſo much Money if ſhe ſurvive him; if ſhe dies before him the Covenant is not broken, tho' he did not make ſuch Grant, 2 *Mod.* 201.

Covenant to grant ſuch Eſtate to his Wife, and ſhe dies before him.

Covenant upon the Receipt of 100 *l.* to give Acquittance, and to enter into Bond, *&c.* no Covenant lies if the Defendant refuſe to receive it, for it is at his Election, *Stiles Rep.* 481. *London* and *Craven.*

Tenant for Life lets the Lands for Years by Indenture, thus: *I give, grant, bargain, and ſell my Intereſt in ſuch Lands for Twenty Years, to hold the ſame in ſuch Manner and Form as I my ſelf held the ſame.* Tenant for Life died within the Term, he in the Reverſion entered, and Leſſee brought Action of Covenant; it lies not, for the Warranty in Law cannot extend to the Plaintiff, he being not Leſſee, but Aſſignee; but if it did, yet now it is determined with the Eſtate of the Tenant *pro* Life; ſo if Tenant in Tail make ſuch a Leaſe and die without Iſſue, 1 *Leon.* 179. *Cheyny* and *Langly*, 3 *Cro.* 157.

Warranty in Law not extends to Aſſignee.

Dame *Say* let an Houſe, and Barn, and Land to *Cowper* for Years, rendring Rent; *Cowper* by Deed aſſigns his Term to *Pollard*; *Pollard* covenants to ſave the ſaid *Cowper* harmleſs of all Covenants, Agreements, and Payments, in the ſaid firſt Indenture of Leaſe: *Pollard* lets for a Year the ſaid Barn to *Cowper*, who put Hay in it, and after grants the Barn and Hay to one *Barber*, and covenanted to warrant it. Dame *Say* diſtreins the Hay. *Cowper* brought Covenant. *Per Cur'*, the Action lies not. Hay in a Barn cannot be diſtreined for Rent no more than Shocks of Corn; but if they were in a Cart,

Covenant extends not to a lawful Diſtreſs, or tortious Acts.

aliter; and if the Diſtreſs is unlawful, the Covenant ſhall not extend to it, for it extends not to tortious Incumbrances, *Jones Rep.* 197. *Cowper* and *Pollard*.

Debt on Bond for Performance of all Covenants, Payments, *&c.* in Indenture of Leaſe, wherein the Defendant, for and in Conſideration of 400 *l.* lent him by the Plaintiff, granted the Land to him for Forty nine Years, if *G.* ſo long live, provided if he pay 60 *l. per Annum* quarterly, during the Life of *C.* or ſhall within Two Years after his Death pay the 400 *l.* to the Plaintiff, then the Indenture to be void, and a Clauſe of Re-entry for Non-payment. Defendant pleads Performance; Breach aſſigned was, That 30 *l.* for half a Year was not paid at ſuch a Time, during the Life of *G.* Defendant demurs, for that the Breach was not well aſſigned, becauſe there is no Covenant to pay the Money, only by a Clauſe Liberty is given to re-enter for Non-payment. *Per Cur'*, this Action will not lie, it being only a Proviſo, and there being no expreſs Covenant, and therefore no Breach can be aſſigned, 2 *Mod.* 36.

Lies not on a Proviſo, there being no expreſs Covenant to pay the Money.

Covenant lies not on Words of Defeaſance, or in the preſent Tenſe.

Where the Words are Words of Defeaſance, and in the preſent Tenſe, and a preſent Thing to be done, Covenant lies not, but Action on the Caſe; as Covenant to ſtand ſeiſed to an Uſe, or that one ſhall enjoy ſuch a Deed, 1 *Sid.* 48. *Robinſon* and *Ampts*, for this Action will never lie upon any Covenant, but upon ſuch a Covenant as is to do a Thing hereafter, or that a Thing hath heretofore been done, and not when it is for a Thing preſent; as when *A.* doth covenant with *B.* that his black Horſe ſhall be

for

for ever after the Horſe of *B.* This is no good Covenant to give the Horſe to *B.* or to give him Action of Covenant for him, but *A.* may keep him ſtill notwithſtanding; but there is a Difference: If the Covenant be future, as where one doth covenant with another, that, in Conſideration of a Marriage, his Lands ſhall deſcend or remain to his Son and Heir apparent, and the Heirs of his Body on the Body of his Wife; if the Uſes do not ſo riſe, the Covenantee may have a Writ of Covenant againſt the Covenantor, *Plo.* 307, 308. But if the Covenant be *in præſenti*, as that a Man and his Heirs from henceforth ſhall ſtand and be ſeiſed to ſuch and ſuch Uſes, and the Uſes will not riſe by Law, in ſuch Caſe no Action will lie upon this Covenant, for this Action will never lie upon any Covenant, but upon ſuch a Covenant as is either to do a Thing hereafter, or that a Thing is or hath heretofore been done.

CHAP. XXXV.

Covenant againſt whom.

Againſt Aſſignee. Vid. *Aſſignment*, Devant, & infra.

Againſt Infant. Vid. *Apprentices.*

Againſt Under-Tenants. Vid. *Aſſignment.*

Againſt a Feme Covert upon a *Conceſſit* of a Fine.

IT lies upon [*Conceſſit*] of a Term in a Fine, altho' there is no Deed, and this too againſt a Feme Covert, 1 *Sid.* 466. *Wotton* and *Hele. Dev'.*

Againſt Leſſee of the King, tho' no Counterpart.

It lies againſt Leſſee of the King by Letters Patents, tho' there is not any Counterpart ſealed by the Leſſee, Sir *John Brett* and *Cumberland*'s Caſe, 2 *Rol. Rep.* 359. *Dev'.*

Diverſity between original Covenant by the King, and where Covenants are veſted in the King as a publick Truſtee.

Upon original Covenant by the King, there Relief lies upon and againſt all that claim under him, becauſe it was originally in the King by his own Contract; but where Covenants are veſted in the King as a publick Truſtee, no Remedy lies againſt him, as there does upon original Covenant by the King, upon the Behalf, and for the Uſe and Benefit of another Perſon, *Hardr.* 373. *Vid. p.* 117.

Againſt a Corporation.

It lies againſt a Corporation. If a Corporation covenant not to take Toll, and their common Officer appointed for that Purpoſe doth take it, this is a Breach of the Covenant, 43 *Ed.* 3. 17.

If

If a Feoffment or Leaſe be made to Two, or to a Man and his Wife, and there are divers Covenants in the Deed to be performed on the Part of the Feoffees or Leſſees, and one of them doth not ſeal, or the Wife doth not ſeal during the Coverture, and he or ſhe that doth not ſeal, doth notwithſtanding accept of the Eſtate, and occupy the Lands conveyed or demiſed: In theſe Caſes, as touching all inherent Covenants as for Payment of Rent, and the Neceſſaries thereof, as Clauſes of Diſtreſs of Re-entry, of *Nomine Pœnæ*, Reparations, and the like, they are bound by the Covenants as much as if they do ſeal the Deed. So,

Leaſe with Covenants to divers, and one ſeal not, but accepts of the Eſtate, and occupies the Land.

If a Leaſe be made to *A.* for Years, or Life, the Remainder to *J. S.* in Fee, and there is a Rent reſerved, or there be divers Covenants on the Parts of the Grantees, and *J. S.* doth never ſeal the Deed or Counterpart; yet if in this Caſe he accept the Eſtate after the Death of *A.* he muſt pay the Rent, and perform all the Covenants that are inherent, 1 *Inſt.* 231.

If an Indenture be made between *A.* of the one Part, and *B.* and *C.* of the other Part, and therein there is a Leaſe made by *A.* to *B.* and *C.* on certain Condition, and *B.* and *C.* are bound to *A.* by the Indenture in 20 *l.* to perform the Condition, and *B.* only doth ſeal the Deed, and not *C.* yet in this Caſe, if *C.* accept of the Eſtate, he is bound by the Covenants, and one of them cannot be ſued without the other, *Tranſit terra cum onere. Et qui ſentit commodum*, &c.

In what Caſes he that accepts the Eſtate, tho' he ſeal not, ſhall be bound by the Covenants.

If a Man covenant for him and his Heirs, to do any Thing whatſoever, hereby his Heirs are bound, 5 *Rep.* 17.

Covenant against the Heir.

If the Leſſee for Years be ouſted by any other than the Heir himſelf, no Action of Covenant will lie againſt the Heir, or be ouſted from any elder Title by and from the Leſſor.

Baron and Feme covenant not to commit Waſte; Baron dies, no Action lies againſt her.

For what Things it lies againſt her.

If I make a Leaſe to Baron and Feme, and they covenant to do no Waſte, or to repair Houſes, and the Husband dies, and the Wife ſurvives and holdeth it; if the Wife commit Waſte, or do not repair the Houſes, no Action lies againſt her; but in ſuch Caſe the Wife is tied to pay Rent, or to perform a Condition made on the Part of the Leſſor, but not to obſerve or perform the Covenant of the Leſſee, 1 *Brownl.* 3. 31.

CHAP.

CHAP. XXXVI.

Joinder in Action of Covenant, or not. Vid. *Covenant, joint and ſeveral.*

THE Defendant covenanted, that he would not agree for taking the Farm of the Exciſe of Beer and Ale for the County of *York*, without the Conſent of the Plaintiff and another; and the Plaintiff alone brought this Action of Covenant, and aſſigns for Breach, the Defendant's agreeing for the ſaid Exciſe without his Conſent, and had Verdict. *Per Cur'*, here was no joint Intereſt, but that each of the Covenantees might maintain an Action for his particular Damages, otherwiſe one of them might be remedileſs: For ſuppoſe one of them had given his Conſent that the Defendant ſhould farm the Exciſe, and had ſecretly received ſome Recompence for ſo doing, is it reaſonable that the other ſhould loſe his Remedy, who never did conſent? 2 *Mod.* 82. *Wilkinſon* and *Floyd.* Vide *this Caſe*, 3 *Keb.* 638. **Several Intereſts.**

Two Tenants in Common bring Covenant againſt Leſſee for Years, for not repairing the Thing demiſed; and whether they ought to ſever or join, was the Queſtion. And *per Cur'*, they ought to join, becauſe it is a perſonal Action, *Litt. Sect.* 311, 312. tho' it ſavour of the Realty, *i. e.* tho' the Thing of which, (*viz.*) the Houſe is in the Realty, yet the Action is not ſo; it is a Covenant and concerns the Profits, and they muſt **Tenants in Common, where muſt join in Covenant.**

muſt join, *Ray.* 80. *Kitchin* and *Knight* verſus *Buckley*, Vid. 1 *Lev.* 109. *meſme* Caſe, 1 *Keb.* 565, 572. *meſme* Caſe.

Tenants in Common of a Reverſion join.

A Leaſe is made for Years, and Leſſee covenants to repair, after which Leſſor ſells the Reverſion of one Part to *A.* and of the other Part to *B.* and they Two join in Action of Covenant for not repairing of the Houſe: It was moved in Arreſt of Judgment, That this Action ſounds in the Realty, and therefore they ought not to join, but ought to ſever. 2. That this Action of Covenant does not lie for the Aſſignees in this Caſe, becauſe the Leſſee only covenants with the Leſſor and his Heirs, and not with his Aſſignees, as the Plaintiff's are in this Caſe. But *per Cur'*, As for the firſt Exception, *Littleton's* Text warrants that they may join in Action of Covenant, becauſe it's a Perſonal Action. 3. Aſſignee may maintain Covenant in this Caſe, without being named, 1 *Sid.* 157. *Kitchin* and *Compton*, 1 *Lev.* 109.

Covenant with Three, & quolibet eorum.

Indenture Tripartite between Three, *A.* was one of them, and he covenanted with them *& quolibet eorum*; and the Covenant was, That the Land he had aliened to one of them was free from all Incumbrances, and he to whom the Limitation of the Land was, brought a Writ of Covenant ſole. *Per Cur'*, Covenant did not lie by one of them only, but ought to be brought by both, notwithſtanding, 6 *Ed.* 2. *Br. Covenant* 49. judged in the *Exchequer*-Chamber, 2 *Leon. p.* 47. 3 *Leon.* 160. *meſme* Caſe, *Beckworth's* Caſe.

5 *Rep.* 18. *b.*

Joint Action on Two Reverſions.

The Plaintiff had the Reverſion of Two Houſes, one in Fee, and the other for Years, with Covenant for Reparation of both Houſes, and he ſhall have a Joint Action for both,

both, 1 *Brownl. p.* 20. *Pyot* verſus *Lord St. John*, *Cr. Jac.* 329. *Dev'*.

Indenture of Covenants between Two of the one Part, and one *Yate* of the other Part; and amongſt other Covenants, one was: It is agreed between the Parties, That *Yate* ſhall enter into a Bond to pay *Rolls* (who was one of the Two of the other Part) 160 *l.* by ſuch a Day, which was not paid: *Rolls* dies, and *Rolls* the Plaintiff takes Adminiſtration, and brought Covenant againſt *Yate*, for Non-payment of the 160 *l.* to *Rolls* in his Life-time. *Per Cur'*, it doth not lie, for tho' the Monies were to be paid to *Rolls* who is dead, yet he which ſurvives, and is Party to the Indenture, ought to have the Covenant; as in Bond made to Three, to pay Money to one of them, all ought to join in the Suit, for they are all as one Obligee; and if he which ought to have the Money dies, the other Two ought to ſue, tho' they have no Intereſt in the Money, *Yel.* 177. *Rolls* and *Yate*. *Convent' & agreeat' eſt* between the Parties; it is a Joint Covenant, and they ought to join in Covenant, 5 *Rep.* 19. *Slingby*'s Caſe.

Survivor ought to have the Covenant, and not he to whom the Money is to be paid.

If Indentures of Charterparty be made between *A.* and *B.* Owners of a Ship of the one Part, and *C.* and *D.* Merchants of the other Part, and there are ſeveral Covenants on the one Part and of the other; and *A.* only ſeals the Indenture of the one Part, and *C.* and *D.* on the other Part; but in all the Indenture it is mentioned, that *A.* and *B.* covenant with *C.* and *D.* and *C.* and *D.* covenant with *A.* and *B.* In this Caſe *A.* and *B.* may join in Action of Covenant againſt *C.* and *D.* on this Indenture for Breach of Covenant, tho'

One who is Party to the Deed, tho' he never ſealed, may join in Action of Covenant.

tho' *B.* never ſealed the Deed, for he is Party to the Deed, and *C.* and *D.* had ſealed the other Part to *B.* as well as to *A.* upon which the Action is brought, 2 *Rol. Abr.* 22. *Clement* and *Henly*.

Action of Covenant not to receive any Sums above 100 *l.* but that all ſuch Sums ſhould be paid to *Hinton*; this was an Indenture Tripartite, and one Breach is aſſigned in receiving Money on Brandy, Wines, (Prize) on the Joint Stock, for which the other ſhould have joined; as is 5 *Rep.* 18. to which the Court agreed, albeit there were a Covenant in the Deed, that there ſhould be no Survivorſhip, and the Third Party is dead. It was objected, the Plaintiff is an Adminiſtrator of one of the Parties, and ſo cannot join; alſo this is no Joint Covenant to them firſt, but only with either of them: But by *Keling* C. J. the Expoſition muſt be on the whole Deed, which expreſly mentions a Joint Stock, and the Trade Joint, *per Cur'*, 2 *Keb.* 338, 339, 347. *Eccleſton* and *Clypſham*, & 1 *Sanders* 153.

Joinder in Action, becauſe of a Joint Stock, and a Joint Trade.

Queen *Elizabeth* makes a Leaſe for Thirty one Years, of Mills, and grants the Reverſion to Baron and Feme; Leſſee covenants to repair, Baron Sole brings the Action of Covenant, and good; becauſe it is good at Common Law, and it is not brought upon the *Stat.* 32 *H.* 8. *c.* 34. It is a Covenant for Reparations, and the Aſſignee ſhall have Advantage at Common Law, 5 *Rep. Spencer's* Caſe, 1 *Rol. Rep.* 359. *Brett* and *Cumberland*, 2 *Rol. Rep.* 63. 2 *Cro.* 399. *C'eſt C. Dev'.*

Reverſion granted to Baron and Feme, Baron Sole brings the Action.

In

In Action of Covenant againſt Two joinly, on Covenant made jointly and ſeverally; if the Plaintiff hath Judgment againſt one by Default, and be barred againſt the other; on Plea pleaded, he is barred as to both, and ſo in all Actions where of Neceſſity they muſt be joined, as in Debt, Detinue: *Aliter* in Treſpaſs. One Defendant having pleaded Covenants performed and found for him, here it appears the Plaintiff hath no Cauſe of Action againſt any, 1 *Keb.* 284. 1 *Sid.* 76. *Boulter* againſt. *Ford* and *Harris*, 1 *Lev.* 154.

Plaintiff hath Judgment againſt one by Default, and is barred againſt the other on Plea; he is barred as to both, and why.

In Action of Covenant againſt Two joinly, on Covenant made jointly and ſeveverally; If the Plaintiff hath Judgment againſt one by Default, and be barred againſt the other; on Plea pleaded he is barred as to both. *March* 103. *Pl.* 126. *Stiles* 5. *Pl.* 9. 2 *Cr.* 134. and ſo in all Actions where of Neceſſity they muſt be joined, as in Debt, Detinue: *Contra*, in Treſpaſs, or the like. And tho' the Labour to build the Houſe were ſeveral, yet the Matter being contained in the Deed, is joint; but when the Joinder is only on *delictum*, as Two join in Service of *J. S.* if one do not, the Plaintiff may recover againſt him alone. By *Foſter*, as this Caſe is the one, Defendant having pleaded Covenants, and found for him, here it appears the Plaintiff has no Cauſe of Action againſt any; which the Court agreed alſo, *Stiles* 57. *Pl.* 124. In a Writ of Conſpiracy againſt Two, one confeſſeth, and the other pleads; and it is found he did not conſpire, which is found for him, both are hereby diſcharged, which the Court and Bar agreed, 1 *Keb.* 284. *Sid* 76. *Boulter* againſt *Ford* and *Harris*.

Judgment againſt one by Default, and Bar by Plea againſt the other.

CHAP.

CHAP. XXXVII.

Where the Action of Covenant ſhall be laid or brought. Vid. *Trial.*

By Privies in Contract.

THE Action of Covenant being brought by the Parties that are privy in the firſt Contract, it's in the Plaintiff's Election to bring the Action where the Land lies, or where the Covenant was made; but when Iſſue is joined on a Special local Breach, the *Venire* muſt be of that Place according to the Iſſue, altho' the Plaintiff hath Liberty to lay his Action where he will; as 1 *Sid.* 157. *Gilbert* and *Martin*, & 1 *Lev.* 114. Covenant on Leaſe in O. *in Com' Hampt'* of an Houſe in *B.* in *Berks*, and Iſſue taken on *non infregit conventionem*, and the Viſne is from O. it's ill: ſo *Cr. Jac.* 446. Breach for not repairing cannot be laid where the Leaſe was made, but where the Land lies; alſo this is a ſpecial Tort, and not grounded on the Contract: And by the Rules of the Court, the *Venire fac'* ſhall be ſpecial to the Place of the Breach, and not where the Action is, unleſs ſpecially drawn to another Place by Plea.

A Special local Breach.

Leſſee for Years of Lands in *Lincolnſhire*, rendring Rent, the Leſſor grants and aſſigns the Reverſion to the Plaintiff, and he brings Covenant in *B. R.* and lays his Action in *London*, and aſſigns a Breach in Non-Payment of the Rent. The Defendant Leſſee pleads he ſurrendered, and found againſt him in *London*. *Per Cur'*, The Action is well brought, becauſe the *Stat.* 32 *H.* 8. *c.* 34. puts the

the Aſſignee of the Reverſion in the ſame Plight and Stead that the Leſſor himſelf was as to the Action of Covenant; and it is clear the Leſſor might have brought his Action in what Court he pleaſeth, for the Statute had made this Choſe in Action aſſignable; but if it had been Debt for Rent brought in a foreign County, it had been ill, becauſe this was annexed to the Reverſion at the Common Law, and to be brought only where the Land lies, and not elſewhere without Perſonal Contract; but the Reaſon of Perſonal Contract is not extended to the Caſe of Covenant, but theſe by the Statute are transferred as amply as the King might transfer any Thing in Action: And therefore in *Kitchin* and *Buckley*'s Caſe, 1 *Sid.* 401, 402. where in Covenant it appears, that one Plaintiff had one Moiety of the Reverſion, and the other Plaintiff the other Moiety, the Action is well brought; but in Debt they may not join Covenant in *London* for not repairing Hedges, and not plowing Land in *Com' Hartford*, and upon *Nil dicit*, a Writ awarded to the Sheriffs of *London*, to enquire of Damages, and not to the Sheriff of *Hartfordſhire*, and well enough, becauſe the Covenant is founded upon a Writing made in *London*, Cr. *Jac.* 142. *Smith* and *Batten*.

Diverſity between Debt for Rent and Covenant for Rent, as to the Viſne.

Stat. 32 *H.* 8. *c.* 34. explained.

Enquiry of Damages where the Deed is made.

Alledging the Breach in another County ſhall not remove the Action, 2 *Sid.* 118. *Dixon* and *Williams*.

But Covenant was brought in *London*, ſuppoſing the Place of Demiſe *apud Parochiam Sanctæ Mariæ de Bow in Lond'*, of a Meſſuage in *D.* in *Com' Surrey*, and thereupon a Covenant to repair the Houſes, and alledgeth, that *apud Lond' in Paroch'*, &c. he permitted the

the Houſes to decay. Plaintiff demurs on a Vitious Bar pleaded, and it was ſhewed in
h Local. Exception to the Count, that this Breach is of a Matter Local, and not Tranſitory, and is not in this Caſe well aſſigned, and of that Opinion was the Court; and the Plaintiff diſcontinued his Suit, and began *De novo*, *Cr. Jac.* 446. *Shiers* and *Bretton*, 1 *Lev.* 114. *Gilbert* and *Martin*, yet ſee 3 *Lev.* 394. *Hunt's* Caſe.

Grantee of Reverſion brought a Writ of Covenant againſt the Leſſee for Years for Non-payment of Rent; The Queſtion is, Whether it ought to be laid where the Leaſe is alledged to be made, or where the Land lies? *Stat.* 32 *H.* 8. *c.* 34. which gives the Action of Covenant to the Aſſignee of the Reverſion, ſaith, that they ſhall have ſuch Actions in like Manner as the Leſſors ſhould have had. Now if it had been brought by the Leſſor it had been Tranſitory, and ſo in Caſe of Aſſignment by Commiſſioners of Bankrupts, the Aſſignee of the Commiſſioners ſhall bring Debt, as the Firſt Creditor ſhould have done: But on the other Side it was ſaid, that Statute ſhall not be intended to aſſign it as a bare Thing in Action, but to knit it to the Reverſion, and the ſame Remedy is the ſame Remedy in Subſtance; and in Caſe of the Bankrupt's Debt the Contract is only aſſigned, 1 *Ventr. p.* 10. *Nurſtye*, and *Hall*, 1 *Lev.* 259 1 *Sid.* 401. & 1 *Sand.* 237.

Stat. 32 *H.* 8. *c.* 34. explained.

Aſſignment of Action, by Vertue of the Statute of 32 *H.* 8. and Aſſigment of Debt, by Vertue of the Statute of Bankrupts.

CHAP.

CHAP. XXXVIII.

Who ſhall have Covenants.

TWO Coparceners made Partition, and the one covenanted to acquit the other of a Suit occaſioned by the Land ſo divided. Covenantee aliened. *Per Coke*, the Alienee, who is a Stranger to the Covenant, ſhall maintain an Action againſt the Covenantor, becauſe the Acquittal runs with the Land, 4 *Mod.* 75.

Leaſe by a Parſon and *A.* and *B.* Church-wardens of St. *Dunſtans*, and covenant not to build on the Lands let; Breach aſſigned in building an Houſe of Office. Judgment *per* Default *pro Quer'*, but ſtayed, becauſe they do not alledge a Cuſtom to Leaſe as a Corporation, and they ſhall not be intended a Corporation, nor averred that they were Church-wardens at the Time of the Leaſe, 3 *Keb.* 811. *Sherlock*'s Caſe.

Covenant made to Baron and Feme, the Husband alone may bring the Action, 2 *Mod.* 217. *Beaver* and *Laine.*

Executors and Adminiſtrators ſhall take Advantage of all inherent Covenants made with the Deceaſed, altho' they are not expreſly named; as if *A.* covenant with *B.* (not naming the Executor or Adminiſtrator of *B.*) to do a Thing to *B.* or for him, and it be not done, and *B.* die, his Executor or Adminiſtrator may have Action of Covenant; ſo if *A.* covenant with *B.* to pay to *B.* 5 *l.* at *Eaſter* following, and do not ſay, [Or to

Brought by Executors, tho' not named.

to his Executors, or Adminiſtrators;] if *B.* dies before *Eaſter*, his Executors or Adminiſtrators may have Action of Covenant, or of Debt, if the 5 *l.* be not paid to them at *Eaſter*, 5 *Rep.* 17. *Dier* 112. 271. *Hob.* 145.

Corporation. Action of Covenant lies for one Corporation againſt another.

Eſtoppel. If Leſſee for Years by Eſtoppel grant over his Term, the Aſſignee ſhall not have Covenant, becauſe he had nothing in the Land but only an Eſtoppel.

If a Feoffment be made in Fee, and the Feoffor covenants to warrant the Land to the **Heirs.** Feoffee and his Heirs, the Heir of the Feoffee ſhall take Advantage of this, *Dier* 338.

Heirs, where to bring the Action. If *A. B.* and *C.* have Lands in Coparcenry, and they purchaſe other Lands in Fee, and they covenant each to other, his Heirs and Aſſigns, to make ſuch Conveyance to the Heir of him that dies firſt of a Third Part, as he ſhall deviſe; in this Caſe, the Heir, and not the Executor, ſhall take Advantage of the Covenant, *Dier* 337, 338.

Baron

Baron and Feme.

A Reverſion is granted to Baron and Feme, and to the Heirs of the Husband, and after a Covenant is broken by the Leſſee: Baron Sole may bring the Action of Covenant, where Damages ſole are to be recovered, there the Husband only ſhall have the Action, 1 *Rol. Rep.* 359. *Bret* and *Comberland*, 1 *Rol. Abr.* 348. *contra*, 2 *Mod.* 217.

Leaſe for Years to Baron and Feme, the Leſſor ouſts them; they may join in Covenant, becauſe after the Death of the Baron ſhe ſhall have the Term, if he grants it not over, *Pl.* 11. upon the Covenant in Law, 1 *Rep.* 17. *Dier* 257.

Where Baron and Feme muſt join in the Action as Aſſignees, *Jones* 406. *Midlemore* and *Goodale*, & 1 *Cr. Car.* 505.

Action of Covenant lies againſt a Feme upon a Warranty by her and her Husband, annexed to an Eſtate for Years in a Fine, 2 *Sand.* 180. after the Baron's Death, and when Warranty is annexed to an Eſtate for Years, in a Fine, it is only a Covenant for Damages in the Perſonal Lien.

Covenant brought by Executors, and where by the Heir.

By Common Law, Executor (although he is not named) ſhall have Action of Covenant in all Caſes, becauſe he is Privy, and *Quodammodo* Party, for he repreſents the Perſon of the Teſtator. 1 *Inſt.* 208. *b.* and more than the Heir. *Ib.* 209. *a.*

And this upon a Covenant in Fact, or a Covenant in Law.

And upon Covenant inherent that concerns the Land, and upon a collateral Covenant, and upon a Perſonal Covenant, Executors ſhall have Action of Covenant, for Breach of a Covenant made to the Teſtator. *Regiſt.* 165. *Br. Exec'* 161.

Executors ſhall have a Covenant, on a Covenant to the Teſtator, for a Perſonal Thing. *F. N. B.* 145. *d.*

Upon Covenant, That my Executors ſhall pay 10 *l.* Debt, doth not lie againſt them, becauſe the Teſtator was not charged, but Covenant lies there: But if Covenant to pay to you 10 *l.* Debt lies againſt me, *per Cur'*, *M.* 32 *&* 33 *Eliz.* and in *Perot* and *Auſtin's* Caſe, *P.* 33 *Eliz.*

If *A.* covenant with *B.* to pay to him 1000 *l.* at *Michaelmas*, and does not ſay to his Executors, *A.* dies before *Michaelmas*, his Executor may have Action of Covenant againſt *B.* for the ſaid 1000 *l.* as is admitted in *Dier* 112 *b.*

Executors of an Aſſignee ſhall have Action of Covenant, for the ſame Right which was in the Teſtator, comes to his Executors. 5 *Rep.* 17. *b.*

Bond

Bond made to one and his Heirs, his Executor, and not his Heir, ſhall have Debt upon it. *F. N. B.* 120.

The ſame Law of Adminiſtrators as Executors.

Where the Heir ſhall take Advantage of a Covenant.

If *A. B.* and *C.* have Lands in Parcenary, and purchaſe other Lands in Fee, and they covenant each to the other, and his Heirs and Aſſigns, to make ſuch Conveyance to the Heirs of him who ſhall die firſt, of a Third Part as he ſhall deviſe here, the Heir, and not the Executor, ſhall take Advantage of this Covenant. 5 *Rep.* 17.

Action of Covenant was brought by *A.* Executor of *B.* againſt *C.* upon Articles of Covenant, upon a Deed made between *B.* and *C.* in which the Plaintiff declares upon the Deed, and ſhews the Deed at large; in which is recited, concerning the Sum of 2000 *l.* agreed to be paid by the ſaid *C.* for Monies before received of the Lady *D. P.* Wife of the ſaid *B.* it is agreed by the ſaid Articles between the ſaid Parties, That there were remaining in the Hands of the ſaid *C.* of the ſaid Sum of 2000 *l.* the Sum of 1000 *l.* over divers particular Sums disburſed by him to ſeveral Perſons therein named, by the Aſſent of *B.* and then *B.* covenants, That the ſaid *C.* ſhall be ſaved harmleſs for the ſaid Monies remaining in his Hands, touching a Suit in the *Exchequer*, and then *C.* covenants with *B.* *Quod pro tam longo tempore quali dicta Sum'* 1000 l. *remaneret in manibus dicti C. ipſe ſolveret, ſeu ſolvi cauſaret dicto* B. *annuatim,*

Saving harmleſs, touching a Suit in the *Exchequer*.

Covenant to pay Intereſt.

& quolibet anno Summam 100 *l.* at ſeveral Feaſts, by equal Portions, half Yearly: The firſt Payment to commence at *Michaelmas* after, and after *B.* to whom the 100 *l.* is to be paid, dies. It ſeems that the ſaid 100 *l.* ſhall be paid to the Plaintiffs, the Executors of *B.* at the ſaid Feaſts, ſo long as the 1000 *l.* ſhall remain in the Hands of *C.* for it appears, upon the whole Deed, that the ſaid 1000 *l.* were the Monies of *B.* in as much as it is recited, that they were delivered to *C. per Dominam D. P.* Wife of *B.* who cannot have any Monies which are her own proper Monies. Alſo there is Allowance made by *B.* of divers Sums, Parcel of it, by *C.* and this Sum engaged by *B.* to ſave *C.* harmleſs of a Suit in the *Exchequer*; and it was the Intent of the Parties, that *C.* ſhould pay the ſaid 100 *l.* ſo long as the 1000 *l.* ſhould remain in his Hands, which was but Intereſt for the 1000 *l.* and foraſmuch as the 1000 *l.* which is the Principal upon the whole Deed, appears to be the Monies of *B.* and after his Death belonging to *A.* his Executor, *A.* the Executor ſhall have the 100 *l.* ſo long as the 1000 *l.* remains in the Hand of *C.* though not named, for that the Principal belongs to him. 1 *Rol. Abr.* 913. *Popham* and *Hunt.*

Adminiſtrator ſhall have Covenant by the Equity of the Statute 33 *Ed.* 2. *cap.* 11. 9 *Rep.* 40. *Henſloe*'s Caſe.

Arrears of Penalties go to Executors, but future to the Heir.

A. by Indenture enfeoffs *B.* in Fee, and *B.* covenants with *A.* and his Heirs, That if *B.* or his Heirs fail of doing a certain Act Yearly to *A.* and his Heirs; then, as often as any Failure ſhall be made, 5 *l.* Penalty to *A.* or his Heirs: *A.* dies, his Executors or Adminiſtrators may by Action of Debt recover

cover the Arrears of the 5 *l.* Penalties due at his Death, but the future growing Penalties ſhall go to the Heir of *A.* for which he ſhall have Action of Debt. *Dier* 24. *Q. Caſ. Liver.*

The Aſſignee of a Leſſor, or Leſſee for Years, and every Aſſignee of ſuch Aſſignee, their Executors or Adminiſtrators, or the Aſſignee of ſuch Executor or Adminiſtrator, may have Action of Covenant for the Breach of any Covenant in the Leaſe, as to repair the Premiſſes, or touching any Thing *in Eſſe*, Parcel of the Demiſe, or relating to the Houſe or Land demiſed. 5 *Rep.* 16. *Godb.* 69. or the quiet Enjoyment thereof, though the Covenant be not for the Leſſor or Leſſee, and their Executors, Adminiſtrators and Aſſigns. *Ibid.*

Executors and Adminiſtrators ſhall take Advantage of inherent Covenants, though they be not named.

If *A.* by his Deed acknowledge to *B.* That he had in his Cuſtody an Obligation of 400 *l.* in which *C.* is bound to *B.* and that he would be ready, *ad omnia tempora cum inde requiſitus eſſet ad redeliberand' præd' ſcriptorum obligatorum præfat'* B. and after *B.* dies before any Requeſt made; and after *E.* the Executor of *B.* demands this Obligation of *A.* and he refuſeth to deliver it, *E.* ſhall have Action of Covenant upon this Deed, although that the Covenant was to deliver it to the Teſtator upon Requeſt; which implies, That the Requeſt ſhould be alſo by the Teſtator, inaſmuch as the Thing to be delivered, (*viz.* the Obligation) goes to the Executor, and the Executor repreſents the Perſon of the

Covenant to deliver to the Teſtator upon Requeſt, yet Executor ſhall requeſt and have Action on Refuſal.

Teſtator; as in *Chapman*'s Caſe, *Com.* 28 *b.* and 1 *Rol. Abr.* 913, 914. *Walker*'s Caſe.

Declaration, That the Defendant enfeoffed his Teſtator in certain Lands, and that he covenanted for him and his Heirs, that he was ſeized of a good Eſtate in Fee, and he alledged the Breach. *Per Hob.* and *Winch* preſent only in Court, the Covenant being made with the Heir, the Executor ſhall not have Action of Covenant, for it is annexed to the Land. *Winch p.* 19. *Bull* and *Frankeſter.*

Where Heir ſhall have the Action, and not the Executor.

Indenture of Covenants between Two of the one Part, and one *Yate* of the other Part. One Covenant was; It is agreed between the ſaid Parties, That *Yate* ſhall enter into Bond to pay *Rolls* (by Name), which was One of the Two of the one Part, 160 *l.* by ſuch a Day, which was not paid: *Rolls* dies, the Plaintiff takes out Adminiſtration and brought Covenant againſt *Yate*; it lies not, for tho' the Money was to be paid to *Rolls*, who is dead, yet he who ſurvives, and is Party to the Indenture, ought to bring the Action. *Yel.* 177. *Rolls* and *Yates.* So I covenant with *B.* and *C.* jointly to perform a certain Act to *B.* only; I break the Covenant, and then *B.* dies, and *C.* ſurvives, the Executors or Adminiſtrators of *B.* cannot ſue me on this Covenant, nor ſhall have any Benefit by it; for though the Act was to be done to *B.* only, yet the Action of Covenant goes to *C.* only, who ſurvived *B.* and after his Death, to his Executors or Adminiſtrators. 2 *Brownl.* 207. *Unc. v. Dy.* 350. *Pl.* 20.

Surviving Covenantee to bring the Action, tho' he hath no Benefit.

Mor-

Morley's *Case*.

Note: *Brian*, Biſhop of *Winchester*, ſeized of a Rectory in Right of his Biſhoprick, demiſeth it by Indenture to *J. S.* for 21 Years, and *J. S.* thereby covenants with the ſaid Biſhop, and his Succeſſors, to repair the Houſe and Barns; during the Term the ſaid Biſhop dies, and after *J. S.* aſſigns his Term to *S. G.* and Biſhop *Morley* is Succeſſor in that Biſhoprick, and he dies before the Term of *J. S.* was expired; and after *S. G.* dies, and the Executor of Biſhop *Morley* brings Action of Covenant againſt Executors of *S. G.* for Breach of Covenant by *S. G.* in his Life, in not repairing in the Life of Biſhop *Morley*; it well lies for the Succeſſor Biſhop's Executor. 2 *Vent.* 56.

By the Executors of a Succeſſor Biſhop, on Covenant in a Leaſe made by the Predeceſſor Biſhop.

Covenant brought againſt Executors or Adminiſtrators.

In a Leaſe for Years, by Deed indented, the Words, [*Yielding and Paying*] during the Term, ſo much Rent, are an expreſs Covenant to pay the Rent; upon which an Action of Covenant lies againſt the Leſſee, or his Executors or Adminiſtrators, though they are not named after his Death: So would it have been if thoſe Words had been only a Covenant implied in Law. *Stiles* 307, 416, 432. *Yel.* 387.

Covenant againſt Executors, though not named.

Covenant by the Plaintiff, as Executor of *J. S.* for that the Defendant covenanted with *J. S.* his Heirs and Aſſigns, That they ſhould enjoy the Land, and it was an Eſtate of Inheritance; yet the Breach being in the Teſtator's

ſtator's Life-time, the Executor had well brought the Action for Damages. 1 *Ventr.* 176. *Lucy* and *Levington.* 2 *Lev.* 26. 2 *Keeble* 831. *Meſme* Caſe.

Covenant brought by the Heir.

Declaration, That the Defendant enfeoffed his Teſtator in certain Lands, and that he covenanted for him and his Heirs, That he was ſeized of a good Eſtate in Fee, and he alledgeth the Breach. *Per Cur'*, the Covenant being made with the Heir, the Executor ſhall not have the Action, for the Covenant is annexed to the Land. *Winch p.* 19. *Bull* and *Frankeſter.* Vide *ſupra.*

Againſt Heir. If a Man covenant for him and his Heirs to do any Thing, hereby his Heirs are bound; but otherwiſe, except an Heir be bound by the Deed by expreſs Name, he ſhall ſcarcely be bound in any Caſe. 5 *Rep.* 17. *Br.* Covenant 38. 32 *H.* 6. 32. *Dyer* 257. *Fitz.* Covenant 31. And therefore, if Leſſee for Years be ouſted by any other but the Heir himſelf, no Action of Covenant will lie againſt the Heir, unleſs there be an expreſs Covenant wherein he is bound; but if he be ouſted by the Heir, it ſeems this Action of Covenant will lie againſt him; but if he be ouſted by an elder Title from the Leſſor, *contra*, for there the Heir ſhall not be charged.

Where Heir ſhall have the Action.

Heir. *A.* enfeoffs *B.* in Fee, and covenants or warrants to *B.* and his Heirs, the Heir of *B.* ſhall take Advantage of it. *Dyer* 338.

So

So if *A.* covenant with *B.* and his Heirs to enfeoff *B.* and his Heirs of Land, and *B.* dies before it's done, his Heir ſhall take Advantage of it. *Ibid.*

And if *A. B.* and *C.* have Land in Parcenary, and purchaſe other Lands in Fee, and they covenant each to the other, his Heirs and Aſſigns, to make ſuch Conveyance to the Heir of him who dies firſt, of a Third Part, as he ſhall deviſe here, the Heir, and not the Executors, ſhall take Advantage of this Covenant. 5 *Rep.* 17.

Decanus & Capitalus Eccleſiæ Cathedralis ſanctæ & individuæ Trinitatis Briſtol, *queruntur de* C. G. *in Cuſtod' Mar'*, &c. *de placito conventiones fract'*. Dean and Chapter Demiſe to *H.* and *H.* aſſigned to *W. G. W. G.* made his Will, and made the Defendant Executor, and Breach aſſigned in not repairing a Barn (as *G. H.* had covenanted), which was not repaired by the Teſtator, nor the Executor: The Plaintiff ſues the Defendant in his own Right, and they ought to have ſued him as Executor only, for he is not chargeable with the Breach of Covenants, unleſs he had Aſſets: As *Hob.* 188, 281. *Cro. Jac.* 647. And Judgment ought to be, *De bonis Teſtatoris*, although the Breach be the proper Default of the Executors; and ſo the Action miſtaken. 1 *Sanderſ. D.* and Biſhop of *B.* verſus *Guiſe*, & 2 *Keb.* 285.

Defendant ſued in his own Right, whereas he ought to be ſued as Executor.

On Covenant againſt Executor, on expreſs Covenant by the Teſtator, for him, his Executors and Adminiſtrators, on Demiſe to the Teſtator for Rent, Covenant will bind Executors, and an Executor is as an Aſſignee, as grounded on the Deed; but if Breach happens not while he is Aſſignee, but after his

his Aſſignment, then it muſt be againſt the ſecond Aſſignee. The Executors are liable to Rent, incurred before Aſſignment in their own Right, but after Aſſignment only, as Executor: Alſo, had the Teſtator aſſigned, the Executor might on Debt or Covenant plead *Nil debet*, or fully adminiſtred in Covenant to repair; where Aſſignee is chargeable, ſo long as he hath Poſſeſſion, if it be brought as Executor, Judgment ſhall only be, *De bonis Teſtatoris*. The Action in the Principal Caſe was for 240 *l.* As to one Quarter, he pleads *Nil debet*, as to the reſt fully adminiſtred. *Twiſden* conceived this no Plea in Covenant, being charged as well for the Profits, as the Overplus; therefore the Defendant ſhould have pleaded Specially, That the Land was worth but ſo much, *ultra quod*, no *Aſſets*. 3 *Keb.* 189, 446, 466, & 493. *Boulton* and *Camam*.

Executor, how to plead.

Covenant againſt the Defendants, Executors of C. Leſſee, for Rent Arrear in the Defendant's Time: Defendant pleaded Aſſignment before Rent Arrear. Plaintiff demurs; and *per Cur'*, though the Debt may be in the *debet & detinet*, on the Executor's Poſſeſſion, and then ſuch Aſſignment is a good Plea; *contra*, on expreſs Covenant, where the Defendant is charged as ſuch; but if charged as Aſſignee only, then the Plea were good, by Aſſignment before the Rent Arrear; and here Judgment muſt be, *De bonis Teſtatoris*: Therefore Judgment *pro Quer'*. 3 *Keb.* 367. *Wigſon* and *Gerrard*. This Caſe is miſtaken, being of a Revocation.

Defendant pleads Aſſignment before Rent Arrear.

If a Man do covenant for himſelf, only to pay Money, build an Houſe, or quiet Enjoyment,

joyment, and the like, and doth not ſay in the Covenant, his Executors or Adminiſtrators; yet his Executors or Adminiſtrators hereby ſhall be bound, and ſhall be charged.

If Leſſee *pro* Years covenant for himſelf to repair the Houſes demiſed, omitting other Words. Q. If he be bound to repair, but only during his Life, and Adminiſtrators are not bound; but if theſe Words be added, [during the Term,] they are bound: So if the Covenant be to diſcharge the Tenant of all Quit-rents. 10 *H.* 7. 10. *Br.* Covenant 38. *Dyer* 257.

A. covenanted with *B.* to put the Son of *A.* Apprentice to *B.* or otherwiſe, That the Executor of *A.* ſhall pay to *B.* 20 *l.* (not ſaying *A.* himſelf, or his Executors, ſhall pay 20 *l.*) if *A.* dies, not having performed the Covenant, yet his Executors, are not chargeable, for it cannot be a Debt in the Executor, which was none in the Teſtator. *Cro. Eliz.* 232. *Perrot* and *Auſtin.* But if *A.* covenant to pay 20 *l.* to *B.* not naming his Executors or Adminiſtrators, yet they are chargeable by Action of Debt or Covenant after the Death of *A.* becauſe he covenanted for himſelf.

Covenant, That the Executors of *A.* ſhall pay to *B.* 20 *l.* not naming himſelf, no Covenant lies.

A Cuſtom is in *Briſtol*, That *conventio ore tenus facta*, ſhall bind the Covenantor as ſtrongly as if it were made by Writing; this does not extend to the Executors of the Covenantor. 1 *Leon. p.* 12. *Wood's* Caſe. *Q. le Liv.*

Conventio oré tenus facta.

A. leaſeth Land to *B.* for Life of *B.* *B.* by Indenture grants, bargains and ſells his Intereſt to *C.* for 20 Years, to hold in ſuch Manner and Form as *B.* had the ſame, and not otherwiſe; *B.* dies within the 20 Years, and *A.* ouſts *C.* reſolved that *C.* can have

no

No Covenant againſt Executor, becauſe determined.

no Action of Covenant againſt the Executor or Adminiſtrator of *B.* for the Covenant and Warranty of *B.* determined by his Death, together with his Eſtate. 1 *Leon.* 179. *Et Cro. Eliz.* 157.

Covenant to teach an Apprentice his Trade, binds the Executors.

Covenant againſt an Executor, upon the Covenant of the Teſtator, to teach an Apprentice his Trade: It was moved, That this Covenant was Perſonal to the Teſtator, and does not bind his Executors, but only binds the Maſter, during his Life, to teach the Apprentice. But *per Cur'*, it binds the Executors alſo, and they ought to ſee the Apprentice taught his Trade; and if they are not of the Trade, they ought to aſſign him to another who is of the Trade, ſo that he may be taught. 1 *Lev.* 177. *Walker* and *Hull.* Vide *ſupra.*

Againſt Executors, for Arrears of Rent.

Covenant againſt Executors, upon Arrears of Rent, and it appears not whether the Arrears were in the Life of the Teſtator, or after. If it be in the *Detinet* only, and after a Verdict, it ſhall be intended to be in Arrear before his Death to ſupport the Verdict. 1 *Sid. p.* 375, 376. *Stephenſon's* Caſe. *Et* 2 *Keeble* 400.

Againſt the Heir.

In an Aſſumpſit againſt an Heir, upon a Promiſe to pay Money due upon his Anceſtor's Bond, it ought to be averred, That the Heirs of the Obligor were expreſly bound. 2 *Sand.* 136.

CHAP.

C.

CHAP. XXXIX.

In what Caſes it lies againſt the Aſſignee, and againſt the Aſſignor, or both; or, what Covenants ſhall bind the Aſſignee, or not. *Vide infra.*

Aſſigns not named.

ASſignee of the Leſſee ſhall be charged in Covenant for Repairs (though Aſſigns are not named in the Covenant) in Reſpect of his having Poſſeſſion; ſo ſhall the Aſſignee of the Reverſion have Action of Covenant for Default of Repairs, in Reſpect of his having the Reverſion, altho' the Aſſignees are not named in the Covenant. 1 *Lev.* 109. *Knight* and *Buckly.* 1 *Sid.* 157. *Raymond* 80. 1 *Keb.* 565. *Id. Caſ.*

Aſſignee, how chargeable.

Executor aſſigned a Term for Years, Aſſignee parted with his Intereſt to another; the Leſſor brought Covenant againſt Aſſignee for Rent, who pleaded, That he had aſſigned his Intereſt, *&c.* but without Notice given to the Leſſor, or Acceptance of the Rent, *&c.* and held good, becauſe the Aſſignee is only chargeable in Reſpect of the Land; and, when that is gone, he is no longer liable. 4 *Mod.* 72, 76.

Where part is aſſigned.

If *A* demiſe to *D.* divers Parcels of Land, and Leſſee covenants for him and his Aſſigns to repair, *&c.* and after the Leſſee aſſigns to *B.* all his Eſtate, in Parcel of the Land demiſed, and afterwards *B.* doth not repair that to him aſſigned, Leſſor may have Action of Covenant againſt *B.* the Aſſignee. *Tr.* 17 *Car. B. R. Conham* and *King. Cro. Car.* 221. *Vid. le Caſ.*

If

Covenant for Rent againſt the firſt Leſſee, notwithſtanding Acceptance of the Rent of the Aſſignee.

If a Man lets Land for Years, rendring Rent, and Leſſee covenants for him and his Aſſigns to repair the Houſe during the Term, and after the Leſſee aſſigns over the Term, and the Leſſor accepts the Rent of the Aſſignee, and after the Covenant is broken; notwithſtanding the Acceptance of the Rent of the Aſſignee, the Action of Covenant lies againſt the firſt Leſſee, for the Leſſee had covenanted expreſly for him and his Aſſigns, and this Perſonal Covenant cannot be transferred by the Acceptance of the Rent. *M.* 10 *Jac.* *Ventrice* and *Goodcheap*, *Barnard* and *Goskale*, *Bret* and *Cumberland's* Caſe. 16 *Car.* 1. *B. R.* *Norton* and *Ackland*, Counteſs of *Devon* and *Collier*, *Pa.* 20 *Car. B. R.* *Crofts* and *Taylor*.

Covenant, where lies againſt the Aſſignee or Leſſee Election.

If Leſſee covenant, That he and his Aſſigns ſhall repair the Houſe demiſed, and Leſſee grants over his Term, and the Aſſignee doth not repair; Action of Covenant lies either againſt the Aſſignee at Common Law, for that this is a Covenant which runs with the Land, or it lies againſt the Leſſee, at the Election of the Leſſor. 25 *H.* 8. *Br.* Covenant 32.

No Aſſignment, nor Acceptance of the Rent, by the Hands of the Aſſignee, ſhall hinder him from ſuing as Executor, no more than if Leſſee binds himſelf in a Bond to pay his Rent, his Aſſignment and Acceptance of the Rent, by the Leſſor of the Aſſignee, ſhall not take away the Advantage of his Obligation.

Plaintiff was poſſeſs'd of a Term of 30 Years, and makes a Leaſe to the Defendant for 16 Years; in which the Defendant (Leſſee) covenants not to build upon a Parcel

of Land demiſed; Breach aſſigned in Building.

Defendant pleads, after and before the Breach aſſigned, the Plaintiff grants the Reverſion to *J. S.* to which Grant the Tenant attorns. Plaintiff demurs generally.

1. Q. If the Covenant paſſeth by the Grant of the Reverſion to the Grantee, for then the Action will not lie for the Grantor, or that the Covenant remains with the Aſſignor, and then a Right of Action may be ſued upon the Covenant only, paſs'd by the Aſſignment to the Grantee. *Per Stat. H. 8.* which is in the Affirmative only, (*viz.*) That the Grantee ſhall have Action of Covenants, for if ſo, then the Action may be brought either by the Grantor, with whom the Covenant remains, or by the Grantee to whom an Action is given by the Statute, but agreed not by both, for a Recovery by one ſhall be a Bar to the other; and it was ſaid, That this being an expreſs Covenant, the Party to whom the Covenant is made may ſue it, after Aſſignment, as *Batchelor*'s Caſe, and *Midlemore*'s Caſe. *In* 1 *Crook. Cro. Car.* 188.

2. Q. If this Covenant be not transferred with the Land, by the Aſſignment at Common Law, as appurtenant to the Eſtate, being concerning the Eſtate; and to this was cited, a Caſe between *Harper* and *Burroughs*, 19 *Car.* 2. *B. R.* wherein Covenant for Non-Payment of Rent, in the Name of the Grantee, the Court will intend the Action brought upon the *Reddendo*, which is a Covenant in Law, and paſſeth by the Grant to the Grantee at Common Law, with the Eſtate; and it was ſaid, It would be greatly inconvenient if the Covenant ſhould remain with

the

the Grantor after the Aſſignment, for then he may releaſe it after the Aſſignment, as was in *Midlemore* and *Goodale*'s Caſe; but no Reſolution as to theſe. 3 *Lev.* 154. *Beely* and *Parry*.

Covenant for Rent lies againſt Leſſee after Aſſignment of the Term, *per* the Grantee of the Reverſion.

Covenant for Non-Payment of Rent, and declares, That *P.* was ſeized of the Place, where, *&c.* and demiſed to the Defendant, who covenanted to pay the Rent, and that after *P.* by Indenture, for the Conſiderations therein mentioned, (which Indenture *Profert in Curia*, but it is not entered *in hæc verba*), grants the Reverſion to the Plaintiff in Fee; to which the Defendant attorned, and for Rent Arrear the Action is brought in the County where the Land lies, as it ought. Defendant pleads, That ſuch a Day he aſſigned his Term, at which Time no Rent was in Arrear, but doth not plead any Acceptance of the Rent *per* the Plaintiff of the Aſſignee, nor Notice of the Aſſignment: Upon which the Plaintiff demurs generally. *Per Cur'*, the Action well lies againſt the Leſſee of the Term by the Grantee of the Reverſion, being expreſs Covenant after the Aſſignment. 1 *Crok. Batchelor* and *Gage*, *Thursby* and *Hall* verſus *Platt.* 1 *Sid.* tho' Notice and Acceptance of the Rent had been pleaded; but for a Fault in the Declaration, Judgment was ſtayed. *Scil'*, That the Plaintiff doth not mention to whoſe Uſe the Grant of the Reverſion was, nor any Conſideration, but the Conſiderations in the Indenture; and it appears not what they were. 3 *Lev.* 233. *Edwards* and *Morgan.* 36 *Car.* 2. So Action by the Deviſee of the Reverſion. *Godb.* 161. *Briſtow*'s Caſe. Vide 3 *Levin.* 295.

Grant of a Reverſion to others, without ſaying to whoſe Uſe.

In

In the *Common Pleas* the Plaintiff declared, That ſhe was poſſeſs'd of certain Houſes in, *&c.* for a certain Term of Years; and that ſhe demiſed the Houſes to *R. G.* for 21 Years, under a certain Rent, which he covenanted to pay. The Leſſee entered, and made his Will, and made *Suſan Gill* Executrix, and died. That ſhe proved the Will, and entered, and aſſigned the Term to the Defendant; who entered, and was poſſeſs'd, *&c.* Breach, That *Pritcher* had not paid the Rent, after the Aſſignment made to him by the Executor *S. G.* Defendant *Pritcher* pleads, That before the Rent became due, he aſſigned his Intereſt to *James Mott*, but did not plead Notice given to the Plaintiff, or that ſhe had accepted the Rent. On Demurrer in *C. B.* to this Plea, Judgment was there given for the Plaintiff, and Error brought in *B. R.*

Q. Whether the Defendant *Pritcher* ought to have pleaded, That he had given the Plaintiff *Tovey* Notice of the Aſſignment. *Per Cur'*, in *B. R.* Notice of the Aſſignment to the Plaintiff, *&c.* was not then neceſſary; for by the Aſſignment the Privity of Eſtate was gone, the Aſſignee is chargeable, by Reaſon of the Land; and when he has parted with his Intereſt, there can be no Reaſon why he ſhould be any longer liable, eſpecially ſince the Executrix of the Leſſee is ſtill bound to perform the Covenants in the Leaſe, as long as ſhe has Aſſets: And ſo was it ruled in *Helier* and *Casbard*'s Caſe. *Sid.* 266. And *Overton* and *Siddal*'s Caſe, in *Cro. Eliz.* 555. which ſaith, That an Action doth not lie againſt an Executor of a Leſſee for Years, after ſuch Executor had aſſigned

the Term, becauſe there is neither Privity of Contract, or Eſtate, remaining in him to ſupport the Action. This has been denied to be Law, *Cauſa qua ſupra.* 2 *Ventr.* 234. 4 *Mod.* 71. *Pritcher* and *Tovey.*

Aſſignee not bound to pay an Annual Sum, being a collateral Covenant.

Leſſee covenants to pay Yearly, during the Term of 21 Years, 20 *s.* to the Churchwardens of *S.* and to repair the Houſes: The Aſſignee did not pay the Rent, and Action is brought. *Per Cur'*, the Aſſignee is not chargeable with this Covenant of Payment of this Annual Sum, becauſe it's a meer collateral Covenant, and it was not well aſſigned, for it is not ſhewed for what Time the Rent was in Arrear. *Cro. Jac.* 438. *Mayou* verſus *Buckhurſt.*

Note, That though upon expreſs Covenant to pay Rent, Covenant lies againſt the Leſſee for Rent Arrear, after his Aſſignment; yet, it ſeems, ſuch Action does not lie againſt Leſſee upon Covenant in Law, *(Yielding and Paying)* after the Aſſignment. *Sid.* 447.

Teſtator Leſſee covenanted for himſelf, his Executors and Aſſigns, That he would not erect any Building in the Garden, to the Prejudice of the Plaintiff's Lights, in his Houſe adjoining, *&c.* and alledges, That ſuch an Aſſignee of the Teſtator's, againſt that Covenant, had erected an Houſe in the ſaid Garden, to the Prejudice of the Plaintiff's Lights in his Houſe adjoining. Defendant pleads, the ſaid Leſſee aſſigned over his Houſe to one *J. S* who entered and paid his Rent to the Plaintiff, and the Plaintiff accepted him for his Tenant; and demanded Judg-

Judgment *ſi Actio.* Demurrer. *Per Cur'*, It is an expreſs Covenant, That he ſhall not build, it ſhall bind him and his Executors, and no Aſſignment nor Acceptance of the Rent, by the Hands of the Aſſignee, ſhall take from him the Advantage of ſuing him or his Executors, upon an expreſs Covenant. *Cro. Car.* 188. *Batchelor* and *Gage*, Executors of *Gage*, 3 *Lev.* 155, 233, 326. 1 *Sand.* 240.

Covenant againſt the Defendant, as Aſſignee of an Aſſignee, for not repairing of an Houſe, lies, though the Defendant is but Aſſignee of Parcel of the Things demiſed; and it was ſaid, he was not chargeable with this Covenant, no more than the Aſſignee of Parcel ſhall be charged in Debt for Rent; but the Action lies againſt the Firſt Leſſee, as in *Walker's* Caſe.

Againſt Aſſignee, tho' but Aſſignee of Parcel of the Thing demiſed.

But *per Cur'*, This Covenant is dividable, and follows the Land, with which the Defendant, as Aſſignee, is chargeable by the Common Law, or by the Statute 32 *H.* 8. *Cro. Car.* 221. *Congham* and *King.*

A Pariſhioner covenants with the Parſon to pay him Yearly at *Lammas-Day*, ſo long as he ſhall be Parſon, 11 *s.* and the Parſon, in Conſideration of this, and upon Recept of the ſaid 11 *s.* covenants by the ſame Deed, with him and his Aſſigns, *Exonerare & acquietare* him of the Payment of the Tythes of *B.* Cloſe, ſo long as he ſhall be Parſon; the Parſon lets the Cloſe for a Year, and ſo from Year to Year, *Quamdiu Ambabus, &c.* the Parſon, after Three Years Libels in Court Chriſtian. The Defendant moves to have a Prohibition. 1. This is but a Covenant, and not a Leaſe, for it depends upon a Con-

dition Precedent, upon the Receipt of 11 *s.* 2. Admit this was a Covenant, yet Prohibition lies, for his Remedy is by Action of Covenant. In this Caſe, the Aſſignee is not Aſſignee within the Intent of the Condition, for he ought to be Aſſignee of the whole Eſtate; and here, after the firſt Year, he had but Eſtate at Will. *Stratton*'s Caſe, 44 *Eliz. B. R. Roth.* 485. One covenanted for him and his Aſſigns to repair an Houſe to him demiſed, and he aſſigns over his Land in Part; and it was held, That this was not an Aſſignment within the Covenant. *Vide* 5 *Rep.* 97. *Goodale*'s Caſe. 2 *Rol. Rep.* 121. *Alderes* and *Wray*.

Aſſignee ought to be Aſſignee of the whole.

Leſſee aſſigns all his Term in Part of the Land, Leſſor ſhall have a Joint Action againſt Leſſee and Aſſignee. *Cro. Jac.* 411.

Dean and Chapter of *Windſor*, 30 *H.* 8. let an Houſe to *A.* for Years, by Indenture, and *A.* covenanted to repair the Houſe at all Times neceſſary, during the Term. *A.* grants his Eſtate to *Hyde*, and dies. Covenant is brought againſt *Hyde* for not repairing; who pleaded, *Quod non permiſit Domum præd' eſſe ruinoſam & diſcoopertam*, at any Time neceſſary, *&c. Per Cur'*, an Action of Covenant lies againſt an Aſſignee, though he be not named. *Cro. Eliz.* 457, *&* 552.

Againſt an Aſſignee, tho' he be not named.

If a Man makes a Leaſe for Years, and covenants with him and his Aſſigns, his Aſſignee by Parcel ſhall have Action of Covenant. 3 *Rep.* 63. *a. Auder* and *Nokes*'s Caſe, cited there; which Caſe is reported in 3 *Cro. Eliz.* 373, *&* 436.

Note,

Note, An Aſſignee of a Reverſion may bring Action of Covenant againſt a Leſſee, after he had aſſigned the Term, notwithſtanding the Acceptance of the Rent from the Aſſignee of the Leſſee. 4 *Mod.* 81.

A Man made a Leaſe for 30 Years, the Leſſor covenanted to repair the Houſe: The Leſſee granted Parcel of the Term for 10 Years. It was holden, That his Grantee ſhall not have an Action of Covenant, by the Statute 32 *Hen.* 8. of Condition, for he is not Tenant to the Firſt Leſſor; but if the Leſſor grants his Reverſion for Years, his Grantee ſhall have Covenant or Benefit of the Condition, with which the Leſſee is charged, for he is an Aſſignee within the Statute, becauſe the Leſſee holdeth of him. *More* 139.

Count againſt the Aſſignee, of the Inheritance of a Meſſuage, upon the Indenture of Purchaſe made by the Plaintiff to the Firſt Purchaſer; wherein he covenant for him and his Aſſigns, with the Plaintiff, to make a Ditch and Fence, *&c.* and to maintain this a good Fence for ever. Breach, That the ſaid Fence was ruinous, and that neither the ſaid *J. V.* the Firſt Purchaſer, in his Life, nor the Defendant, his Aſſignee, after his Death, had kept it in good Repair.

Not againſt the Aſſignee for Breach, in the Time of the Aſſignor.

After Verdict for the Plaintiff, Judgment was arreſted, for that the Action doth not lie againſt the Defendant, as Aſſignee for Breach, in the Time of his Aſſignor; and the Breach being aſſigned for Default of Reparation of the Fence, as well in the Time of *J. V.* Aſſignor, to the Defendant, as in the Time of the Defendant, and Damages being entirely given, the Plaintiff could not have Judgment. *Lut.* 363. *Brillin* and *Vaux.*

A. and *B.* agree *per* Writing, concerning the Purchaſe of Lands in *F.* and after *A.* covenants with *B.* to aſſign to him the Lands in the Writing.

In Action on this Covenant, *B.* may not ſhew in his Count that *A.* covenanted to aſſign the Lands in *F.* but the Lands in the Writing, and ſhew this; and that the Lands in the Writing and in the Declaration are the ſame. *Lut.* 489. *a.*

Covenant. Aſſignment.

Note: The *Stat.* 32 *H.* 8. *c.* 34. doth not extend to Covenants upon Eſtates in Fee, or in Tail, but only upon Leaſes for Lives, or for Years. To what Eſtates the *Stat.* 32 *H.* 8. extends to.

And this *Stat.* 32 *H.* 8. *c.* 34. extends to Covenants which touch or concern the Thing demiſed, and not to collateral Covenants, where it lies by the Aſſignee or not, who are Aſſignees within *Stat.* 32 *H.* 8.

Defendant ſeiſed of Lands in Fee, let them for Life, Remainder for Life, and after acknowledges a Statute, and ſold the Reverſion, and covenants with the Bargainee, his Heirs and Aſſigns, that it ſhould be diſcharged within Two Years of all Statutes and Incumbrances, except the Leaſes for Life; the Statute is extended, and thereupon the Rent and Reverſion is extended: The Bargainee grants this Reverſion to the Plaintiff, who for not diſcharging this Statute, brings Covenant. It lies not:

1. Becauſe the Covenant was broken before the Plaintiff's Purchaſe, the Land being then in Extent, and ſo a Thing in Action; it could not be transferred over, and ſo Action lies not.

2. *Stat.* 32 *H.* 8. extends not to Covenants on Eſtates in Fee, *&c. Vid ſupra:* And therefore this Aſſignee was out of the *Stat. Cr. El.* 863. *Lewes* and *Ridge.*

Aſſignee of Aſſignee ſhall have Action of Covenant, ſo the Executors of the Aſſignee of an Aſſignee, ſo the Aſſignees of Executors or Adminiſtrators of every Aſſignee, for all are compriſed within this Word [*Aſſigns,*] for

for the ſame Right which was in the Teſtator or Inteſtate, ſhall go to his Executors or Adminiſtrators, 5 *Rep.* 17. *b. Spencer's* Caſe.

Action of Covenant as Aſſignee, and names not himſelf Aſſignee.

Plaintiff brings Action of Covenant as Aſſignee, and does not name himſelf Aſſignee, (but after in the Declaration ſhews how he is Aſſignee) it's good enough, eſpecially after Verdict, *Cr. El.* 823.

Aſſignee of a Copyhold is within the Statute to have Action of Covenant, 1 *Keb.* 357.

Aſſignees of Executors and Adminiſtrators Tenants by Statute or *Elegit*, or after Sale upon a *Fi' fac'*, a Husband in Right of his Wife ſhall take Advantage of inherent Covenants, 5 *Rep.* 17.

If a Man make a Leaſe for Years, and covenant with him and his Aſſigns, his Aſſignee *per* Parole ſhall have Action of Covenant, and ſo Feoffee *per* Parole ſhall vouch as Aſſignee, 3 *Rep.* 63 *a.*

Action of Covenant lies againſt the firſt Leſſee, after Aſſignment and Acceptance.

It was a Queſtion in *Matures* and *Weſtwood's* Caſe, Whether the Aſſignee of the Reverſion ſhall have Action of Covenant againſt the firſt Leſſee after the Aſſignment of his Term? *Per Gawdy*, the Action well lies. It was admitted by all, that tho' he were but an Aſſignee of a Reverſion for Years, yet he was a ſufficient Aſſignee to have Action of Covenant. The Defendant's Plea was ill: He pleads he granted his Leaſe, *&c.* but doth not ſhew the Place, ſo it's not iſſuable to be tried.

If Leſſee aſſign, and after Leſſor accept of the Aſſignee for his Tenant, he may not after maintain Debt for Rent againſt the firſt Leſſee, but he may maintain Covenant againſt him: And it was alſo adjudged, That if the Leſſee aſſign his Term, and after the

Leſſor aſſigned his Reverſion, and the Aſſignee of the Reverſion accepts the Rent of the Aſſignee of the Term, yet he may have Action of Covenant againſt the firſt Leſſee, 1 *Sid.* 402. *Thursby* and *Platt*'s Caſe, 3 *Rep.* 22. *Walker*'s Caſe, 2 *Keb.* 448, 492. 1 *Lev.* 259.

Act of the Leſſee ſhall not divide the Action of the Leſſor.

The Act of the Leſſee ſhall not divide the Action of the Leſſor. Leſſee aſſigns all his Term in Part of the Land, Leſſor ſhall have a joint Action againſt Leſſee and Aſſignee: So if Two Leſſees make a Partition, the Leſſor may have one Action againſt them, *Cr. Jac.* 411. *the Bailiff and Commonality of Ipſwich's Caſe*, 3 *Bulſt.* 211. *meſme Caſe.*

Covenant to renew a Term.

T. Iſtead, Executor of *J. Iſtead*, Executor of *R. Iſtead*, brought Covenant againſt *R. Stonely*, Aſſignee of *J. M.* Aſſignee of Q. *Elizabeth*, Siſter and Heir of Q. *Mary*, Siſter and Heir of K. *Edward*, Son and Heir of *Henry* VIII. Aſſignee of the *Prior and Covent of St. Pancras*; and declared, That the ſaid Prior by his Deed-Indent' demiſed to the ſaid *R. Iſtead* the Land, *&c.* for the Term of Forty Years, and in the ſame Indenture granted as enſues, *(viz.) Et ulterius dictus Prior & Conventus conceſſ' pro ſe & Succeſſoribus ſuis quod legitimum eſſet, dicto* R. Iſtead, *& ſuis Aſſignat' ad aliquod tempus infra præd' Terminum vel ad finem dicti Termini habere dictam dimiſſionem ſuam renovat'*, &c. And counts further, how the Reverſion came to King *Henry* VIII. and from him to the Queen, and from her to the Defendants? And further, how the Leaſe came to the Plaintiff according to the Contents of the Writ. And the Defendant ſeiſed of the Reverſion, and the Plaintiff poſſeſs'd of the Leaſe, and that he required him to renew the Term: And the Defendant refuſed.

refuſed. It was moved, that this Action lies not againſt the Aſſignee of the Reverſion upon the *Stat.* 32 *H.* 8. For tho' the Words are general, yet they are not generally to be taken: For of the Covenants which do not depend upon the Intereſt of the Land, but are collateral Things, the Grantees of Reverſions ſhall not take Advantage; as if the Covenant were, That the Leſſor ſhall yearly deliver to the Leſſee 10 *l.* or to repair a Bridge, not being on the Land leaſed; for the Law never intends, that other Covenants than ſuch as depend upon the Land, as to repair a Meſſuage, Fences, *&c.* Payment of Rent, and Penalties for Non-payment, *&c.* and this Covenant, which is collateral, does not depend upon the firſt Term, nor upon the Land during the ſaid Term, but is to make a new Leaſe, which is, as if the Leſſor had covenanted to have made a Leaſe of other Lands which were not leaſed; but the Judges were of Opinion for the Plaintiff. 1 *Anderſon* 82. *Iſtead*'s Caſe, but perhaps for ſome other Reaſon.

Stat. 32 *H.* 8. extends not to collateral Covenants.

Baron and Feme grant the Reverſion, Grantee brings covenant as Aſſignee of the Baron only.

Baron and Feme ſeiſed, and to the Heirs of the Husband, let to the Defendant; the Defendant covenants with them, and the Heirs of the Husband, to do all Reparations, they convey the Reverſion to the Plaintiff, who brought Covenant as Aſſignee to the Husband only, and good. *Cr. Car.* 285. *Major* and *Talbot*, *Jones* 305. *meſme* Caſe.

Aſſignee by Eſtoppel cannot have Action on Covenant.

The Aſſignee of a Leaſe by Eſtoppel ſhall not take Advantage, ſo as to have any Action upon Covenant; *Cr. El.* 437. The Declaration was, *Quod cum Johannes King*, 10 *Eliz.* let to the Defendant for Years, *Virtute cujus*, he was poſſeſſed, and granted to *Abel* by Indenture with the Covenant, who in 15 *El.* aſſigned

aſſigned it to the Plaintiff; and further alledgeth, That long Time before that the ſaid *J. K.* had any Thing, one *Robert King* was ſeiſed in Fee, *viz.* 7 *El.* and ſo ſeiſed, died ſeiſed in 15 *El.* and it diſcended to *Thomas King*, who entered upon the Plaintiff and ouſted him; ſo he doth not ſhew that *John King*, who made the Leaſe, had any Thing, for *Robert King* was thereof then ſeiſed; and then when *John King* let it to the Defendant, and he granted his Term by Indenture, nothing paſſed but by Eſtoppel, then the Leſſee by Eſtoppel cannot aſſign any Thing over, and then the Plaintiff is not Aſſignee to maintain this Action of Covenant, *Cr. El.* 436. *Nokes* and *Awger*.

The Aſſignee ſhall have Action of Covenant without ſhewing any Deed of Aſſignment [in Covenant for peaceable Enjoyment without Interruption:] For it is a Covenant which runs with the Eſtate, and if the Eſtate be paſſed without Deed, the Aſſignee ſhall have the Benefit of the Covenant alſo, *Cr. El.* 436. 373. *Nokes*'s Caſe. Where Aſſignee need not ſhew any Deed of Aſſignment.

Note: Altho' upon expreſs Covenant for to pay Rent, Covenant lies againſt the Leſſee for Rent Arrear after his Aſſignment; yet it ſeems ſuch Action doth not lie againſt the Leſſee upon a Covenant in Law, as upon yeilding and paying after the Aſſignment; 1 *Sid.* 447. *Devant.*

Aſſignee of a Reverſion brings Debt *pro* Rent; Defendant pleads to Part, *Non debet*; to other Part, That the Leſſor demiſed the Land to him, rendring Rent; and by the ſame Indenture covenants for himſelf, his Heirs and Aſſigns, with the Leſſee, his Executors and Aſſigns, That if he be enforced to pay any Aſſignee of a Term ſhall have Remedy upon a Covenant by Way of Retainer.

Charges or Iſſues loſt, that he ſhall withhold ſo much of his Rent. *Per Cur'*, the Aſſignee of a Term ſhall have Remedy upon a Covenant, by Way of Retainer againſt the Aſſignee of a Reverſion; and this both at Common Law, and by the *Stat.* 32 *H.* 8. *Cr. Car.* 137. *Bayley* verſus *Clifford.*

Covenant that the Leſſee, nor any of his Under-Tenants or Aſſigns, ſhould not dig Gravel, other than for Repairs; and Plaintiff alledgeth, one *B.* an Under-Tenant digged. Defendant takes Iſſue, that he was not Sub-Tenant *modo & forma*, the Leſſor having made another Leaſe before of *Kills*, which Leſſee made a Leaſe of the Pits to *H.* for Part of his Term *H.* aſſigned to *B.* Q. is, If *B.* be ſuch a Sub-Tenant according to the Covenant? It was objected, *B.* is no Under-Tenant to *E.* Leſſor for Debt lies not againſt him: Had the Words been, [None claiming under him ſhould dig,] it had been for the Plaintiff; but *ejus teneus*, he cannot be no more than if *E.* had been dead at the Time.

Under-Tenants, who.

Per Cur', one may be Under-Tenant, altho' the Leſſor were dead; alſo Under-Tenant is any that comes under the Leſſor's Intereſt, *Brumfield* againſt *Williamſon.* Covenant that he and his Aſſigns would pay Rent, the Tenant at Will, or his Aſſignee, is within the Meaning thereof. Leſſee for Forty nine Years of Copyhold, which hath Common in Waſte, with Covenant that he nor his Aſſigns ſhall not uſe the Waſte with Cattle. If his Under-Aſſignee of Part put in his Cattle, it is a Breach, and other Tenants than Under-Tenants of the Soil are intended within the Covenant, 1 *Keb.* 775, 806. *Boarman* and *Aſton.*

In

In what Caſes the Aſſignee ſhall be bound, though not named. Vid. *Reparations.*

A Man lets Land for Years, and Leſſee covenants in this Manner, *Proviſo ſemper & præd'* J. *(le Leſſee)* doth covenant, that he ſhall repair, maintain and ſuſtain, the Houſes upon the Premiſſes, *ad omnia tempora neceſſaria*, during all the ſaid Term; and after the Leſſee aſſigns over the ſaid Term: The Aſſignee ſhall be bound by this Covenant to repair the Houſes, during the Life of the firſt Leſſee, altho' that the Aſſignee be not named, for that the Covenant runs with the Land, being made for the Maintenance of a Thing *in eſſe*, at the Time of the Leaſe made: But in this Caſe the Aſſignee ſhall not be charged in a Writ of Covenant, for any Breach after the Death of the firſt Leſſee, in as much as this is perſonal to the Leſſee himſelf, 1 *Rol. Abr.* 521. Dean of *Windſor* and *Hide*. *Vide* this Caſe, *Cr. El.* 473, 552. 5 *Rep.* 24. *a.* A Covenant that runs and reſts with the Land, lies for or againſt the Aſſignee at the Common Law, altho' the Aſſignees be not named in the Covenant, 5 *Rep.* 168.

A Covenant to repair, Aſſignee is bound, tho' not named; ſo in all Covenants that run with the Land.

D. covenants in his Leaſe for himſelf, his Executors and Adminiſtrators, to leave Fifteen Acres every Year for Paſture, *abſq; cultura*, and that he granted his Eſtate to the Defendant, and the Defendant *non reliquit* Fifteen Acres *ad Paſturam*, but ſuch a Day and Year plowed up all. It was demurred to the Count, becauſe the Aſſignee not being named, it is not any Covenant which ſhall bind the Aſſignee, for it is collateral. *Per Cur'*, this Covenant is to be performed by

If the Covenant be for the Benefit of the Eſtate, according to the Nature of the Soil, Aſſignee ſhall be bound.

the Aſſignee, altho' he be not named, becauſe it is for the Benefit of the Eſtate, according to the Nature of the Soil; but to do a collateral Covenant, as to build *de novo*, or the like, ſhall not bind him, unleſs named, *Cr. Jac.* 125. *Cockſon* and *Cock.*

The Diverſity in *Spencer*'s Caſe, is,

1. When a Covenant extends to a Thing *in eſſe*, Parcel of the Demiſe; the Thing to be done by Force of the Covenant is *quodammodo* annexed, and appurtenant to the Thing demiſed, and ſhall run with the Land and ſhall, bind the Aſſignee, altho' that he be not bound by expreſs Words; but when the Covenant extends to a Thing that had not Eſſence at the Time of the Demiſe made, this cannot be annexed or appurtenant to a Thing which had not Eſſence; as if Leſſee covenant to repair the Houſes, *&c.* as one covenants for himſelf, his Executors, Adminiſtrators, to build a Brick-Wall upon Part of the Premiſſes; this ſhall not bind the Aſſignee, for the Law will not annex the Covenant to a Thing which hath not Eſſence.

Aſſignee not bound, when the Covenant extends to a Thing that had not Eſſence at the Time of the Demiſe made.

2. But had the Leſſee covenanted for himſelf and his Aſſigns, to build a Brick-Wall on Part of the Premiſſes, for as much as it is to be done upon the Land demiſed, and the Aſſignee is to take the Benefit of it; therefore it ſhall bind the Aſſignee by expreſs Words.

Things to be done by the Covenant meerly collateral.

3. But tho' the Covenant be for him and his Aſſigns, yet if the Thing to be done is meerly collateral to the Land, and doth not touch or concern the Thing demiſed in any Sort, there the Aſſignee ſhall not be charged; as if Leſſee covenant for him and his Aſſigns, to build an Houſe upon the Land

of the Leſſor, which is not Parcel of the Demiſe; or to pay any collateral Sum to the Leſſor, or to a Stranger; this ſhall not bind the Aſſignee.

4. If a Man leaſe Sheep, or other Stock of Cattle, or any other Perſonal Goods, for any Time, and the Leſſee covenants for him and his Aſſigns, at the End of the Term to deliver other Goods or Chattels as good as the Things demiſed were, or ſuch a Price for them, and the Leſſee aſſigns the Sheep over: This Covenant ſhall not bind the Aſſignee, for this is but a Perſonal Contract, and wants ſuch Privity which is between the Leſſor and Leſſee, and his Aſſigns of the Land, in reſpect of the Reverſion; but in caſe of a Leaſe of Perſonal Goods there is not any Privity, nor any Reverſion, but meerly a Thing in Action in the Perſonality, which cannot bind any but the Covenantor, his Executors, or Adminiſtrators, which repreſent him; it is the ſame Law where a Man demiſeth Houſe and Lands for Years, with a Stock or Sum of Money, rendring Rent, and the Leſſee covenants for himſelf, his Executors, Adminiſtrators, and Aſſigns, to deliver the Stock, or Sum of Money, at the End of the Term, yet the Aſſignee ſhall not be charged with this Covenant: For tho' the Rent reſerved be increaſed by Reaſon of the Stock or Sum, yet the Rent doth not iſſue out of the Stock or Sum, but out of the Land only; and therefore, as to the Stock or Sum the Covenant is Perſonal, and ſhall bind the Covenantor, his Executors, or Adminiſtrators, and not his Aſſignee: And it is not certain that the Stock or Sum ſhall come to the Hands of the Aſſignee, for it may be waſted, or

Covenant that is by a Perſonal Contract, as a Leaſe of Perſonal Goods binds not the Aſſignee.

or otherwiſe conſumed, or periſh by the Leſſee, and therefore the Law cannot determine at the Time of the Leaſe made, that ſuch Covenant ſhall bind the Aſſignee.

Leſſee covenants with the Leſſor and his Heirs, not naming his Aſſigns; Leſſor grants the Reverſion over. Aſſignees may have Action of Covenant, tho' not named: And Aſſignees ſhall have Debt for Rent upon general Words, *Reddendo ſolvendo*, without being named, 1 *Sid.* 157. *Kitchin* and *Compler*, 1 *Keb.* 565. 1 *Lev.* 109. & *Raym.* 80. *meſme* Caſe.

CHAP.

CHAP. XL.

Declaration.

IN Covenant the Plaintiff declared upon an Indenture, in which the Defendant had covenanted, he was ſeized in Fee, *&c.* and would free the Premiſſes from all Incumbrances: And another covenant for quiet Enjoyment. And the Breach aſſigned, was upon an Entry and Eviction by another; and concludes, *Et ſic conventionem ſuam præd' fregit*, in the Singular Number. Demurrer, becauſe he did not ſhew what Covenant in particular, *Sed per Cur', conventio eſt nomen collectionem.* And if Twenty Breaches had been aſſigned, he ſtill counts *De placito quod teneat ei conventionem inter eos fac'.* And the Breach being of all Three Covenants, the Recovery in One would be a good Bar in any Action afterwards, to be brought upon either of thoſe Covenants. 2 *Mod.* 311. *Aſter & Mazeen.*

Breach aſſigned did relate to Three Covenants. The Declaration concludes, *Et ſic fregit conventionem*, and good.

In Covenant, if the Sum is miſcaſt, too little or too much, yet it is amendable, and not like to Debt; which if alledged leſs than in Truth it is, not ſhewing the reſt is ſatisfied, it's ill, and not amendable. 3 *Keb.* 59. *Bolton & Lee.* 2 *Cr.* 247. 2 *Lev.* 56.

Sum miſcaſt amendable.

Covenant was brought upon Articles indented; and in the *Memorandum* the Plea was, *De conventione fract'*, but the Declaration was as in Action on the Caſe, *Quod cum per factum Indentat' teſtatur' quod le Def' conceſſit*, without alledging it poſitively; and concludes not *prout ſolet*, in Covenant, *& ſic infregit. Per Cur'*, this is an Action of Covenant. And it is not neceſ-

Delaration, as in Action in the Caſe, *Quod cum, &c.* yet good.

It's not neceſſary in the Aſſignment of a Breach to ſay, *Et ſic infregit conventionem*.

ſary to conclude *& ſic fregit*, but the Covenant being *quod Def. non relaxaret*, a Debt aſſigned to the Plaintiff without his Licence, and the Breach aſſigned *quod Def. relaxavit*, not ſaying without the Licence of the Plaintiff. *Per Cur'*, the Breach is not well aſſigned, and ſo *quer' nil' cap. per Billam.* Sir *Tho. Jones* 229. *Coppin & Slaymaker.*

Diverſity between a Bond and a Covenant in aſſigning a Breach.

Debt on Bond to ſatisfie for all Goods that an Apprentice ſhould imbezel: And in the Replication aſſigned a Breach, that he had waſted *diverſa bona ad valentiam* 100l. Defendant demurs: And it was excepted to the Replication, that it is too general, not ſhewing what the Goods were. But *per Cur'*, It is well enough in this Action upon the Bond, where Dammages are not to be recovered, but the Penalty of that Obligation upon any Breach. *Aliter*, in Covenant where the Recompence is to be for Dammages: And Judgment *pro Quer'*. 1 *Lev.* 94. *French & Pierce.* 1 *Keble* 467. *Meſme Caſe.*

Where one brings Action of Covenant for not paying of Money according to the Covenant, he need not alledge that he requeſted the Defendant to pay it: But where he brings Action of Debt for Money due by Covenant, he ought to alledge a Requeſt. *Tr.* 23 *Car* 1. *B. R. Qu.*

In Action of Covenant, the Plaintiff declares, the Defendant covenanted to take the Plaintiff to be his Clerk, and to allow him 2*s.* for every Quire of Paper that he ſhould copy out, and 1*d.* for every Sheet that he ſhould engroſs, and all uſual Fees; and amongſt other Breaches he alledged, that he copied out a Bill containing Four Quires and Three Sheets, for which 8*s.* 3*d.* was due to him, which the Defendant hath not paid. Verdict and Judgment *pro Quer'*.

Error

Error assigned was, That there could be no Apportionment in this Case; for the Covenant is, That he was to allow him 2 *s.* for copying a Quire, but not *pro Rata.* But if he had averred 3 *d.* to the usual Fee for copying 3 Sheets of Paper, he might have help'd himself upon that Clause. *Allen* 9. *Needler & Guest.*

In Covenant for a Sum certain, no Apportionment, unless it be *pro Rata.*

Where Notice need to be laid or not. Vide *Tit. Notice.*

Covenant that he should assure such Copyhold Land to the Plaintiff if he married with his Daughter, *Secundum Leges Ecclesiasticas.* And alledgeth, that he *ritè & legitime* espoused the Daughter of the Defendant. *Per Cur'*, It is sufficient to the Plaintiff to alledge *Licet sepius requisitus*, without giving Notice of the Marriage, for he at his Peril ought to take Notice thereof; and he need not shew a Court to be holden, for he ought to procure a Court to be holden. Judgment *pro Quer'*. *Cr. Jac.* 102. *Fletcher & Pynsett.* 1 *Lev.* 41. *Basset & Morgan.*

Covenant to assure Copyhold Lands.

Sir *B. H.* brought Action of Covenant, and declares, Whereas it was covenanted *inter alia*: Whereas the Plaintiff had bought a Park of *H. F.* esteemed to be 300 Acres, after the Estimation of 18 Foot and an half to the Pole, at the Rate of 100 *l.* for every Acre, and had paid 2500 *l.* that the said Sir *B. H.* and *H. F.* should appoint Two Measurers, the one at the Election of *H. F.* the other at the Election of *B. H.* to measure it before the 31st Day of *January*; and if there appeared to be more Acres at the Measuring than the 2500 *l.* amounted to that Sir *B. H.* should pay as much as should be more before such a Day; and if the Acres did

not amount to ſo much as he had paid, that then *H. F.* and *Goates* ſhould pay ſo much as ſhould be wanting before the 31ſt Day of *May*. And he alledgeth in *facto*, That he nominated ſuch a Meaſurer, and that *H. F.* would not appoint any before the 3d of *January*; that the ſaid Meaſurer juſtly meaſured it, and that there was wanting 70 Acres, which amounted to 750 *l.* and that he, being required ſuch a Day, did not pay it. Defendant takes Iſſue, That there did not want any Acres to amount to the Sum of 2500 *l.* and found *pro Quer'* Dammage 400 *l.* Excepted, that *Goates* being a Stranger to the Meaſuring, ought to have Notice that ſo much was wanting before the Day of Payment, and no Requeſt is alledged till *Dec.* 10 *Jac.* which is long after the Day of Payment was paſt. *Sed Cur'*, He being privy to the Covenant, ought to take Notice of the Admeaſurement as well as the Plaintiff, and might have been preſent at the Meaſuring; and though *H. F.* (and not *Goates*) was to appoint the Meaſurer, and did not do it, it was his Default, and they are both Parties to the Covenant. Alſo, in Point of Covenant, Notice is not to be given ſo ſtrictly as upon an Obligation, which is in Point of Forfeiture. Judgment was aſſigned on Error. *Crok. Jac.* 390. Sir *Baptiſt Hicks* verſus *Goates*. 1 *Roll. Rep.* 314. *Godb.* 192. *Vide* ſuch-like Caſe, *Cr. Jac.* 472. *Burwell & Wood.*

One that is privy ought to take Notice.

Notice on Covenant not to be ſo ſtrict as on Obligation.

Monſtre.

Monſtre. *Oyer.* Vide infra, *Tit. Bonds for Performance of Covenants.*

In Action of Covenant the Defendant demands no *Oyer*, but pleads, *Quod in Articulis illis ulterius continuetur.* It's ill; and his ſhewing the Counterpart is not ſufficient, but the whole Indenture ought to be brought into Court. 1 *Keb.* 513. *Preiſland* and *Cooper.*

The Defendant now cannot pray *Oyer* as heretofore, but muſt plead to the Indenture, and produce it to the Court. 1 *Keb.* 104. But it's ſaid in *Ventr.* If the Defendant pleads Performance without demanding *Oyer*, it is a good Cauſe of Demurrer. 1 *Ventr.* 37. Q.

Debt on Bond to perform Covenants, Defendant craves *Oyer* of the Bond, and then *Oyer* of the Condition, which was to perform Covenants made between the Plaintiff and the Inteſtate of the Defendant; and after *Oyer* of the Condition, the Entry on the Roll was, that the Defendant prayed *Oyer* of the Indenture mentioned in the Condition, which was not brought into Court, *Et ei Legitur in hæc verba,* This Indenture, *&c.* and ſets out the entire Indenture in *Engliſh.* *Per Cur'*, Upon general Demmurer it ſhall be intended to be the true Indenture, and that it is in Court, although it doth not ſo appear by the Record. But the Court agreed in this, That the Defendant ought to have ſhewed the Deed, and not the Plaintiff by the Law; though the Court ſhall ſometimes compel the Plaintiff to give a Copy of the Indenture, becauſe the Defendant ſwears he hath no Part, or that it is loſt. 1 *Saund.* 8, 9. *Jevens* and *Harridge.*

Plaintiff declared on a Deed, dated the 30th of *January*: Defendant demanded *Oyer*, and the Date thereupon was by Indenture of another Date. This Miſentry may be amended, being only upon *Oyer*, which is the Act of the Court. *Aliter*, Had it been on a Deed ſo pleaded, it may be amended in another Term, being only a falſe Recital by the Court. 1 *Keb.* 101.

Miſentry amended upon *Oyer*.

In Debt on Bond, upon *Oyer* of the Condition the Defendant pleads Performance generally, it is not good, unleſs he ſhews the Deed and pleads it. *Vid.* 1 *Sid.* 50.

In Debt on Bond, Defendant demands *Oyer* of the Condition, which was to perform Covenants in an Indenture, and then pleads Performance generally without ſhewing of the Indenture; and Demurrer general upon it, and adjudged *pro Quer'*. 1 *Sid.* 425.

Debt on Bond to perform Covenants in an Indenture: Defendant pleads, that there was no Covenant contained in the Indenture on his Part to be performed. The Plaintiff demands *Oyer* of the Indenture, which is entered *verbatim*, and then demurs, which he could not well do before the Entry of it, whereby it becomes Part of the Bar; ſo the Cauſe of the Demurrer appears. It was alledged by *Sanders*, whoſe Hand was to the Plea, That the Plaintiff could not have Judgment, becauſe no Breach was alledged. The Court was offended with him, and they held the Plea in Bar meerly for Delay, and adviſed by him againſt the Statute of *W.* 1. 1 *Ventr.* 43.

In Treſpaſs a Man juſtifies the taking of Four Aſhes, *&c.* as ſeveral which *Licitum foret* for the ſaid Leſſees and their Aſſignes, to take upon the Premiſſes neceſſary Fireboot, Houſeboot,

boot, &c. and for neceſſary Reparations. It was thereupon demurred, becauſe he juſtifies by Force of a Covenant in an Indenture, and doth not ſhew the Indenture, it being a Thing which cannot be granted without Deed. *Per Cur'*, The Plea is ill: For the Servant's juſtifying under the Intereſt of his Maſter, and meddling with the Title, ought to ſhew the Deed; for it is the Subſtance of the Title, and without ſhewing it he cannot juſtifie: And it is his Folly to juſtifie under one who either would not, or could not ſhew the Deed. *Cro. Jac.* 291. *Purfrey* and *Gryme.*

Declaration, That the Plaintiff covenants to ſerve the Defendant Six Years; and that the Defendant covenants to pay the Plaintiff 83 *l.* for every Year *Quarternatim*, *(viz.)* 20 *l.* 15 *s.* at *Michaelmas*, 20 *l.* at *Lady-Day*, 20 *l.* 15 *s.* at *Midſummer*, and 20 *l.* 15 *s.* at *Chriſtmas*; and aſſigns a Breach in the Non-payment of the whole. Defendant demands *Oyer* of the Indenture, which was enter'd as aforeſaid, ſaving that under the [*viz.*] it was 20 *l.* at *Michaelmas*, and 20 *l.* 15 *s.* at *Lady-Day*. Iſſue was taken, that the Plaintiff did not ſerve the Defendant. Verdict and Judgment *pro Quer'*. Error aſſigned in the Variance of the Sums in the Declaration and the Indenture; alſo all the Particulars do not amount to 83 *l.* but 15 *s.* ſhort of it; alſo without the Particulars under the [*ſcilt'*] it does not appear how much ſhall be paid at one Day, and how much at another, and it is not ſaid, *Quarternatim per æquales portiones*. *Per Cur'*, *Quarternatim* ſhall ſupply all this after a Verdict, and the Variance under the [*ſcilt'*] ſhall not hurt, for *Quarternatim* ſhall be intended the uſual Quarter-Days, and that the Payments ſhould be by equal Portion: And although there is not *Quarternatim.*

Covenant and demand more than is due, Jury gives less.

83 *l.* due, but it appears 15 *s.* less was due, yet for that the Jury have not given less than was due. The Demand of more shall not hurt, though in some Cases the Damand of less than is due shall hurt. 2 *Lev.* 99. *Venaston* and *Mackarty*.

Declares *adhuc, &c.* which refers to a Time after the Original, and yet good.

Covenant in a Lease, that he shall enjoy it in *C. B.* Breach assigned, that the Defendant had erected another Messuage *tam proper'*; his Lights were *magnopere tenebrat' & adhuc existunt*. Verdict *pro Quer'*. Moved in Arrest, that *adhuc existunt* refer to the Time of the Declaration; and so Dammages given for a Thing which is after the Original, which is 15 Days at least before the Declaration. But *per Cur'*, Perhaps the Defendant appeared *gratis* without any Original, and then the Action commenceth by the Declaration, and the Recital of the *Summonitus* in the Declaration is but Form. And in Debt on Bond the Declaration is *summonit'*, *&c.* and the Declaration *nondum solvit, &c. & adhuc contradicit unde dicit, &c. quod damnum habet*, where the Words are in the Present Tense, and the Dammages generally, as here; so in Assessment and other Actions, and yet held always good. 3 *Lev.* 246. *Hart* and *Barton*.

Declaration.

Testatum existit, where good or not.

Whereas by Indenture, bearing Date, *&c.* between the Plaintiff and the Testator of the Defendant; *Testatum existit*, that the Plaintiff demised such a Messuage, *&c.* and saith not expresly that *dimisit & convenit*; and it was held by the Court to be good enough. *Cr. Car.* 188. And the usual Course in *B. R.* is to declare in this Manner, that by such an Indenture *Testatum*

tum exiſtit. 2 *Keb.* 79. *Onſlow* and *Anſley*, in which Caſe it is agreed it a good Affirmative: And in 2 *Keb.* 54. *Horneck* and *Sanderſon*, it is ſaid, If the Indenture be ſet forth by a *Teſtatum exiſtit*, in Debt on the Indenture, or in a Plea in Bar, it's naught. *Alit'* in Covenant. *Vid. Wilſon* and *Jeffrey's* Caſe. *Cr. El.* 195. The Prothonotary certified, that it was the common Courſe. In Debt for Rent, *Quod cum per Indentur' teſtatum exiſtit*, is ill; but in Covenant, or Debt on Bond to perform Covenants, ſuch Declaration is good. 2 *Keb.* 383. *Coquer cont' Crine.*

In Action of Covenant to pay 4 *l. per Ann.* during the Life of *A. T.* the Count was, *Cum per quoddam ſcriptum ſigillat, per quod Teſtatum exiſtit*; which *per Cur'*, is well enough after a Verdict. Some ſaid, the *Per quod* ought to be omitted; but *per Cur'*, it is one and the ſame Senſe. 1 *Sid.* 375. 2 *Keb.* 400. *Stephenſon's* Caſe.

In Covenant Plaintiff, declares that the Defendant *per ſcriptum Articulor' convenit*, and ſaith not *ſigillo* (Def') *ſigillat*, it is not good; for it ſhall not be intended *factum* without ſealing. *Cr. El.* 571. *Southwell* and *Brown. Uncore vid.* 1 *Vent.* 70. *Per Scriptum, and ſaith not ſigillo ſigillat.*

The Addition of a Perſon in the Covenant, who is no Party to the Deed, is idle, and he ought to be omitted out of the Declaration: So if the Covenant has inſenſible Words, thoſe only which are ſenſible ought to be recited, and the Breach to be laid therein. *Cr. Jac.* 358. *Goodman* and *Knight*. So of an inſenſible Obligation. 3 *Lev.* 21, 22. Breach to be laid in the ſenſible Words.

Declaration on Covenant in Indenture, which recites *quod cum per Indenturam teſtatum exiſtit*: *Per Cur'*, It's good, and the Diverſity is where *Teſtatum exiſtit.*

where it is by Way of Declaration, and where by Way of Bar or Replication; for in the Declaration, *Teſtatum exiſtit* is ſufficient to induce the Action, and to aſſign the Breach. *Cro. Jac.* 537. *Bullivant* and *Holman.*

Covenant with the Maſter of a Ship to pay Primage, and avers he did not pay it, but ſaith not in his Declaration what that is, yet good. *Latch. p.* 50.

In Debt on Bond, conditioned to ſeal a Deed, and perform the Covenants, he pleads he did ſeal the Deed, and perform the Covenants; he muſt ſet the Covenants forth, that the Court may judge of their Sufficiency. 2 *Keb.* 849. *Biſcow* and *Mountague.*

Two Exceptions were taken to a Declaration in Covenant.

1. The Covenant is, That the Plaintiff and his Wife ſhall enjoy certain Farms; and the Breach is aſſigned, that the Defendant entered upon the Plaintiff into the ſaid Farms. *Per Coke*, This is good enough.

Licet, and ſaith not *Tamen.*

2. It is, *Quod licet ipſe perimplevit* all Covenants on his Part, and the Defendant had not performed his Covenants. This *Licet* is not good without a *Tamen*, *Licet* not being any direct Affirmative: But Judgment *pro Quer'*. 1 *Roll. Rep.* 267. *Pemberton* and *Platt.*

Defendant covenanted, he was ſeized in Fee, *&c.* and would free from Incumbrances, and in it there was a Covenant for quiet Enjoyment; and the Breach aſſigned was upon Entry and Eviction by another, and concludes, *& ſic conventionem ſuam prædictam infregit*, in the ſingular Number, and doth not ſhew in what Covenant in particular. But *per Cur*, *Conventio* is *nomen Collectivum*; and if Twenty Breaches be aſſigned, he ſtill counts in *Placito quod teneat ei conven-*

Conventio nomen collectivum.

ventionem inter eos fact'. And the Breach being of all the Covenants, the Recovery in one would be a good Bar in Action afterwards to be brought upon either of these Covenants. 2 *Mod.* 311. *After* and *Mazein. Devant.*

Plaintiff declares, That it was agreed between him and the Defendant, that the Plaintiff for 1200 *l.* should demise certain Lands to the Defendant for a Term of Years, *& quod scribi & ingrossari fecit quandam Indentur' bargainie & vendition' per quam mentionat' fuit, quod demisit* the Lands to the Defendant for the Term, *quam quidem Indent' ipse sigillavit & deliberavit ut fact' sum' virtute cujus ac vigore Stat'*. The Defendant was possessed, but had not paid the Money: The Defendant demurs upon this Declaration, for the Lease is alledged only by Way of Recitement. But *per Cur'*, The Pleading is as good as if he had said, *Quod per Indentur' dimisisset*. Sir *Tho. Jones* 24. *Harris* and *Hillesley*.

Lease alledg'd only by Way of Recitement.

Debt on Bond, conditioned for Performance of Covenants *in quadam Indentura hic in Cur' prolat'*; and in Truth the Deed was not indented, but was written, *hæc Indentura facta: Per Cur'*, It is not any Indenture, though there be Two Parts thereof, and adjudged *contra Deft'*. *Cro. El.* 472. *Frampton* and *Stiles*, 5 *Rep.* 20. *b.*

In quandam Indentura; but it is not indented.

One declares in Covenant, That the Defendant covenanted to find the Plaintiff with Meat, Drink, Apparel, and other Necessaries. It's ill, because he doth not shew in particular what other Thing were necessary. *Cro. Jac.* 486. *Mills* and *Astell.*

Covenant to find Meat, &c. and other Necessaries, and shew not what they are.

Covenant to pay so much Money into the *Exchequer*; and Error was, because he had not set forth in what County the *Exchequer* is. *Stiles, p.* 59. *Teach* and *Clethero, Issuit de Chancery & Bank le Roy, Moor* 176.

The

Assignee.

The Plaintiff brings Action of Covenant as Assignee, and doth not name himself Assignee (but after, in the Declaration, shews how he is Assignee); it's good enough, especially after a Verdict. *Cro. El.* 823. *White* and *Ewer*.

Indenture mistaken as to Parties.

The Plaintiff declares, by Indenture between the Defendant and *A.* it was covenanted, and upon *Oyer* there were Three, *A. B.* and the Defendant; it's ill. *Latch. p.* 50. *Constable* and *Clobery*.

Covenant in some Cases is pursued strictly: The Plaintiff declares, That the Defendant covenanted to take the Plaintiff for Clerk, and to allow him 2*s.* for every Quire of Paper he should copy out. The Breach is assigned, that he copied out a Bill containing Four Quires and Three Sheets, for which 8*s.* 3*d.* was due. And Judgment was reversed, because there could be no Apportionment in this Case; it was 2*s. per* Quire, but not *pro Rata*. *Allen p.* 19. *Needler* and *Guest*. *Dalt.*

That the Dedant is indebted as appears, but shews not how.

Debt for 1000*l.* on Deed of Charter-party; it appears not by the Plaintiff's Declaration that the Defendant is indebted to the Plaintiff, but only he saith, He is indebted as it appears, but shews not how. *Per Cur'*, It is by Indenture, and well enough. *Dyer* 148. *Plo.* 121, 122. *Stiles's Rep.* 133. *Freher's* Case. Either an Action of Debt or Charter-party lies here, for it is on a Charter-party. Here is not indeed a perfect Allegation, yet it is usually thus pleaded.

Defendant covenants, Whereas the King had granted the Office of *Aulnegeor* to the Duke of *Lenox*, who had made the Plaintiff his Deputy for Seven Years of all the Places in *Essex* (except *Colchester*); that the Defendant covenanted, Whereas the said Duke of

Lenox

Lenox had made a Deputation of that Office in *Colcheſter* for Two Years to *E.* that at the End of the Two Years he would procure to them a Deputation for Seven Years in the ſame Manner that *E.* had it, *proviſo* that they, upon the making thereof, ſhould give Security for Payment of 100 *l. per Ann.* And they alledged in *facto*, that they were always ready to give Security for the Rent, and that the Defendant had not procured the Deputation. Defendant demurs. *Per Cur'*, The Declaration is good: It is enough they have alledged a Readineſs to give Security, and they need not ſhew they required a Deputation to be made as the other was, or indeed that any Deputation was made to *E.* The Covenant mentions a Deputation, and he is eſtopt to ſay the contrary, and he ought at his Peril to procure to the Plaintiffs ſuch a one as that was. Neither need they ſhew the Breach according to the uſual Form, *Et ſic non tenuit conventionem in hoc*, for there was a Breach ſufficiently alledged. *Cr. Jac.* 297. *Barwycke* and *Gibſon.*

Sic non tenuit conventionem in hoc.

Plaintiff declared, he made the Leaſe to the Defendant the 28th of *May*, and that afterwards, *ſcil'* the 27th of the ſame Month, he broke the Covenant. *Per Cur'*, Where the *Poſtea* and *Scilicet* are repugnant in a Deed, the *Poſtea* ſhall be good to ſignifie the Time of the Covenant broken, and the *Scilicet* ſhall be void. *Stiles Rep.* 45.

Poſtea & Scilicet repugnant.

Charter-party between *B.* Owner of a Ship, and *L.* and *M.* Merchants, Freighters of a Ship; *B.* puts to freight to them the Ship in a Voyage to *Guinea* at 48 *l. per* Month: Then there is a Covenant for the Payment of the Freight, *viz.* when the Ship arrives at *Guinea*, the Freight then due was, upon Notice of it, to be paid in *England*, and the Reſidue when ſhe arrives in *England*;

England: And ſaith, that at ſuch Time the Ship arrived at *Guinea*. Six Months and Ten Days were then paſt, which comes to ſo much, and Notice thereof given; and that after ſuch a Time the Ship arrived into *England*, and that the Freight for Six Months of the Time of the laſt Payment came to 287 *l.* 4 *s.* and the Defendant had not paid any of the Sums. It was excepted to the Declaration: It appears upon Computation, that the Plaintiff demanded more upon the firſt Breach than is due by 30 *s.* and leſs than is due upon the ſecond Breach by 16 *s.* and though the firſt may be cured by the Jury's finding leſs, or by the Plaintiff's releaſing the Overplus, yet where the Demand is leſs than is due, this is a Fault incurable. *Hales* makes a Difference between this Caſe of Covenant and Debt; and held, that after Verdict it had been cured without Queſtion, although upon Demurrer there may be ſome Doubt, the Demurrer being general, but upon ſpecial Demurrer it had been ill. And Judgment *pro Quer'*, and ſaid, the Defendant may move this in Arreſt Judgment after the Writ of Enquiry, if he would. 2 *Lev.* 56. *Bolton* and *Lee*, & 3 *Keeble* 39.

Demand of leſs than is due.

Variance between the Deed and the Declaration.

Plaintiff declares by Indenture dated the 7th of *Sept.* 1657. whereby the Defendant covenants, that he and one *T. W.* would deliver to the Plaintiff ſo many Maunds of *Salt-petre* at ſuch a Rate before the 20th Day of *October* enſuing, the Plaintiff paying ſo much a Maund; and to the Performance thereof the Defendant binds himſelf in 500 *l.* Defendant demands *Oyer*, and it appears between the Covenant and the Obligation there is a *Proviſo*, That if the

the Defendant ſhould between that and the ſaid 20th Day of *October* be diſabled by Sea, *&c.* to deliver the ſaid *Salt-petre*, that the Deed ſhould be void; and pleads, that he, within the Time aforeſaid, had prepared 1000 Maunds of *Salt-petre*, and that the Boat wherein it was put was caſt away, and ſo he was diſabled. Plaintiff replies, the Defendant had ſufficient *Salt-petre* over and above what was caſt away. And upon Iſſue found for the Plaintiff, and 300 *l.* Dammages, it was moved in Arreſt of Judgment, that there was a Variance between the Deed and the Declaration, for in the Declaration the *Proviſo* is omitted. But *per Cur'*, 1. The Action is brought upon the Covenant, and not upon the Penalty, and the reciting of the Penalty is but Surplus. 2. The Declaration is ſufficient without Recital of the *Proviſo*, according to *Ughtred*'s Caſe, and the Defendant ought to plead the *Proviſo*. *Raym.* 65. *Elicot* and *Blake*. 1 *Keb.* 424, 426. *meſme* Caſe. 1 *Lev.* 88. *meſme* Caſe. *Vid. ſub Tit.* Excuſe.

Where a Declaration is ſufficient without reciting a *Proviſo* in the Articles.

As to Variance between the Count and the Deed, the Iſſue may help it as in this Caſe: The Action is founded on the Covenant to deliver *Salt-petre* at a Day; and on *Oyer* it mentions ſuch a Covenant, but further giveth Liberty, that if the Defendant by Act of God be diſabled, that then he ſhould not pay; which is well, the Action not being founded on the Penalty, but only in the Breach of the Covenant in not delivering: (This was in Arreſt of Judgment, and not on Demurrer on *Oyer* for Variance.) Alſo the Plaintiff hath here agreed the Deed to be the ſame; but if he had pleaded *non eſt factum*, he might have had Advantage of the Variance. The Count is of a Bond dated the 1ſt of *May*, and the Entry is of the 2d of *May*,

In what Caſes Iſſue ſhall help Variance between the Count and the Deed.

on

on Releaſe pleaded, and Iſſue upon it, it is good enough: And here in the principal Caſe, the Iſſue was on the Diſability. 1 *Keb.* 426. *Billage* and *Blake.*

Variance between the Indenture and the Declaration ſhall not ſtay Judgment after a Verdict. 1 *Sid.* 49. *Peys* and *Waters.* 1 *Keb.* 126.

By Agreement between the Plaintiff and the Teſtator of the Defendant, a Parcel of Land was to be ſold for 400 *l.* but if it did not ariſe to ſo much, then they covenanted with each other to repay proportionably to the Abatement; and the Defendant's Teſtator covenanted for himſelf and his Executors to pay his Proportion to the Plaintiffs, ſo as the Plaintiff gave him Notice in Writing by the Space of Ten Days, but ſaith not ſuch Notice was to be given to his Executors or Adminiſtors. On *Oyer* of the Indenture there was a Variance between the Covenant, which was for Notice to be given to the Teſtator, and this Declaration, whereby Notice is averred to be given to the Executors, and a Demurrer on it; but *per Cur'*, this is no material Variance, becauſe this Covenant runs in Intereſt and Charge, and ſo the Executor is bound to pay, and therefore it is neceſſary he ſhould have Notice. 2 *Mod.* 268. *Harwood* and *Hilliard.*

Variance in Point of Notice.

The Covenant was, That he will aſſure, convey, and aſſign a Leaſe: The Defendant pleads Performance. The Plaintiff aſſigned the Breach *Quod non aſſuravit, conveyavit, & tranpoſuit* [*Anglice*, ſet over]. And the Defendant pleaded, *Quod aſſuravit, conveyavit & aſſignavit*, [*Anglice*, ſet over;] and the Word *Tranſpoſuit* is not in the Covenant, nor in the Pleading for Performance thereof. It is an Iſſue misjoin'd. 2 *Leon. p.* 116. *Gray* and *Conſtable.*

Aſſignavit for *Tranſpoſuit.*

In Debt on a Bond of Performance, *J.* and *A.* were named in the Bond; but the Indentures as pleaded, were only betwixt *J.* of the one Part, and the Defendant of the other, but were *revera* betwixt *J.* and *A.* on the one Part, and the Defendant on the other. *Per Cur'*, It is a Variance, and Judgment *pro Quer'*. 1 *Keb.* 127, 167. *Pavie* and *Hall.* Variance as to Parties.

Declaration is, That the Defendant and one *Agnes Knight* by such an Indenture bargained, sold and enfeoffed the Plaintiff of Lands in Fee, reciting that *Robert Knight* by his Will in Writing devised these Lands unto him in Fee; and that the said *Will. Knight* covenanted with the Plaintiff, that he and the said *Agnes*, *tunc habuerunt virtute prædict' ultime voluntatis plenam poteſtatem bonum jus & legitimam authoritatem*, to alien and sell the Lands to the Plaintiff in Fee, and assign the Breach that *Robert Knight* died seised of the said Lands, and made not any Will, whereby the Lands discended to *John Knight* the Heir, who enter'd, *&c.* And Defendant demanded *Oyer* of the Indenture; upon which the Defendant demurred generally, because the Declaration varies from the Indenture, *(viz.)* the Covenant is in this Manner; *And whereas the said* Thomas Knight *and* William Knight *(whereas* Thomas *was not Party to the Indenture, nor sealed the same)* do covenant for them and their Heirs to and with the Plaintiff, That they the said *William Knight* and *Agnes* now have, his Heirs and Assigns, by Force and Vertue of the said Will, do own full Power, good Right, and lawful Authority, to alien, *&c.* for the Covenant as it is in the Indenture is void and insensible. But *per Cur'*, The Declaration is good; for the Addition of *Thomas Knight* in the Covenant is idle, he being no Party to the

Omiſſion of the Name of one who is no Party, good.

Indenture, and therefore the Omiſſion of him in the Declaration is as it ought to be: Alſo the Words in the Covenant, [his Heirs and Aſſignes by Force, *&c.* do own, *&c.* being inſenſible], the Party in the Declaration omitting them, and reciting the Covenant in that which is ſenſible, and laying the Breach therein, is good enough. *Cr. Jac.* 358, 359. *Goodman* and *Knight. Dev.*

Reciting the ſenſible Words, and leaving out the inſenſible.

Amendment in another Term.

In Action of Covenant *queritur de Deft'*, not ſaid *in Cuſtod' Mareſchalli*; and *Bigland* excepted, that in another Term this is not amendable after Demurrer. *Sed per Cur'*, Bail being ſince filed right, it was amended, this being no Part of the Declaration; and ſo reſolved in the Caſe of *Seaman* and *Dee.* 3 *Keb.* 452. *Talbot* and *Wright.*

CHAP.

CHAP. XLI.

Breaches as to Suits in Law.

COvenant that he ſhall not be aiding or aſſiſting to *E.* in any Action to be proſecuted againſt *L.* the Covenantor; and after the Covenantor joins in a Writ of Error with *E.* and another againſt *L.* upon a Judgment on Treſpaſs againſt them Three, which is apparently erroneous: This is not any Breach of the Condition, for it is not properly an Action, but a Suit to diſcharge him of a tortious Judgment, in which they ought all to join. *Hill.* 17 *Jac. B. Lamb* and *Tompſon.* Bringing a Writ of Error.

If Leſſor covenants with his Leſſee for Years, that he ſhall quietly and peaceably enjoy the Land without Impediment and Diſturbance of the Leſſor, *&c.* and after the Leſſor exhibits his Bill in *Chancery* againſt the Leſſee, ſuppoſing that this Leaſe was made in Truſt for certain Purpoſes; but there was a Decree againſt the Leſſor. This is not any Breach of the Covenant, for that the *Chancery* had nothing to do to meddle with the Poſſeſſion, but only with the Perſon: And this Suit ſtands with the Covenant, *viz.* the Truſt. *Tr.* 12 *Jac.* 1. *B. Selbey* and *Shute.* In *Chancery*, Truſt.

In *Raym. Hunt* and *Danvers*'s Caſe, 370, 371. a Suit in *Chancery*, or in the *Exchequer* Chamber, is a Diſturbance contrary to *Shute* and *Selbey*'s Caſe, *Moor* 859, 1179. 1 *Roll. Abr.* 43. 1 *Brownl.* 23. *vid. Winch Entry* 116. it appears Judgment was given for the Plaintiff; and *Winch* was one of the Judges that gave Judgment, and he ſhould better know than any

that reported the Case: And as to 3 *Leon.* 71. the Suit was there by a Lessee against a Stranger, and so the Lessee could not be disturbed thereby. But by *Raym.* I take such a Suit not to be a Breach of Covenant against Incumbrances, because a Decree is no Incumbrance upon the Land, but a Molestation to the Person.

Three Breaches are laid by Three Entries by the Lessor against his Covenant; and as to one the Plaintiff is barred, he may not have Judgment for the rest. *Pal.* 110. *Roberts* and *Stoker.*

Outlawry pleaded in Bar.

Declaration on Indenture of Demise made to the Testator of the Defendant by Baron and Feme, Plaintiffs of the Wives Land:

First Breach, That the Rent reserved was in Arrear.

Second, The House out of Repair.

Third, That the Testator had eradicated certain Trees.

Bar by Outlawry of the Husband, Plaintiff, in *B. C.* Judgment on Demurrer as to all the Breaches; for that the Damages to be recovered, for the Breach of the Covenant for Repairs were not forfeit by the Outlawry. It's an entire Plea to all the Causes of Action; and as to the Damages for not repairing, these are no more forfeitable by the Outlawry than Damage for a Battery, or other Trespass; and then the Plea being entire and ill in part, it's ill in all, as well in this Case as in others. *Lut.* 1513.

What not forfeitable by Outlawry.

The

The Covenant was, If the Defendant ſued or troubled, charged or vexed the Plaintiff; *Per Cur'*, A Suit in *Chancery* is within the Condition. 2 *Keb.* 288. *Aſton* and *Martin.*

The Defendant lets an Houſe to the Plaintiff, and covenanted he ſhould quietly enjoy it without any Manner of Moleſtation or Diſturbance: He enter'd, and ſome Time afterward the Defendant exhibited a Bill in *Chancery* againſt the Plaintiff, wherein he charged the Plaintiff with ploughing of Meadows, and committing Waſte, and obtained an Injunction, whereby he was interrupted in his ploughing, and afterwards the Bill was diſmiſs'd with 20 *l.* Coſts. *Per Cur'*, The Suit in *Chancery* is not touching the Leſſee's Eſtate or Title, but for Waſte which he ought not to do; and though the Suit was groundleſs, yet it not relating to his Title or Poſſeſſion, it is no Breach. 2 *Vent.* 213. *Morgan* and *Hunt. Poph.* 205. If one be poſſeſſed of Lands by Force of an Extent, and by a Decree in a Court of Equity he is forced to pay a Rent out of the Land, this ſhall not be a legal Eviction or Recovery for ſo much; cited in 2 *Vent.* 213.

Suit in *Chancery* not relating to the Title or Poſſeſſion.

Leſſor covenants with his Leſſee, that the Leſſee ſhould enjoy the Land demiſed without any lawful Eviction; and afterward, upon a Suit in *Chancery* by a Stranger againſt the Leſſor for the Land, the Chancellor decreed that the Leſſor ſhould have the Land. This Decree is not a lawful Eviction by which the Covenant is broken; for tho' in Conſcience it be *æquum* that the Stranger have the Poſſeſſion, yet the ſame is not by Reaſon of any Right Paramount the Title of the Leſſor which was in the Stranger, 3 *Leon.* 71. So 1 *Brownl.* 23. ſuch Suit in *Chancery* is no Breach, being no Diſturbance at

Decree in *Chancery* not a lawful Eviction.

Common Law nor Entry; yet *vid. Raym.* 371.

Action of Covenant to ſave harmleſs from Suits and lawful Evictions. Defendant pleads Performance. Plaintiff replies, That *J. S.* took out a Writ by *Hab' fac' Poſſeſſionem* out of *B. R. debito modo Execut'*, and by Vertue thereof enter'd on the Poſſeſſion of the Plaintiff, and did expel and amove him: Defendant demurs. Judgment *pro Deft'*. *Debito modo* is not ſufficient without ſhewing Particulars; as in Debt for Rent, to ſay, *A.* did demand *debito modo*, is ill. 1 *Keb.* 279. *Nicholls & Pullen.* & 1 *Lev.* 83.

Debito modo, where ill in pleading.

Lee brought Covenant againſt *Maddox* and *Iſabel* his Wife. Plaintiff declared, That one *Errington*, the firſt Husband of *Iſabel*, was indebted to the Plaintiff in 20 *l.* and that one *Aſhley* was indebted to the ſaid *Errington* in the like Sum of 20 *l.* *Errington* made *Iſabel* Executrix, and died. *Iſabel* by Indenture *Dum ſola* made the Plaintiff a Letter of Attorney to ſue and recover againſt *Aſhley*; and covenanted, *Quod ipſa ad requiſitionem querentis de tempore in tempus adjuvaret & manuteneret quamlibet, & omnes ſectam & ſectas quam vel quas dict' (Quer') commenſaret & proſequeretur in nomine dict' Iſabelle*, to the Uſe of the Plaintiff, *non exiſtendo*, Nonſuit, *voluntarie*, or making any Diſcontinuance, Releaſe, Countermand, *&c.* without the Aſſent of the Plaintiff: And declares further, That the Plaintiff had brought a Suit againſt the ſaid *Aſhley* for the ſaid Debt; that the ſaid *Iſabel* depending the ſaid Suit, had married the Defendant without the Aſſent of the Plaintiff. The *Quære* was, If by this Marriage the Suit be countermanded? *Per Cur'*, Here is not any Countermand, for by the taking the Husband the Writ is not abated,

Whether Marriage is a Countermand of Suit.

ted, but only abateable; therefore the Plaintiff ought to have ſhewed, that by the taking of the Husband the Writ by Judgment was abated, otherwiſe it is no Countermand, and ſo no Cauſe of Action. But the Declaration is not ſufficient, becauſe there is not any Requeſt laid; and the Plaintiff ought to have notified to *Iſabel*, that he had commenced ſuch Suit. *Q. de hoc*, 1 *Leon.* 168, 169. *Lee* and *Maddox.*

Defendant let for Six Years; and covenanted, That Leſſor ſhould enjoy it during the Term quietly without Interruption, and diſcharged from Tythes and all other Duties; and after the Term expired, the Parſon ſued him for Tythes. *Per Cur'*, This Suit after the Determination of the Term was a Breach of Covenant; but becauſe it was not alledged that the Suit was lawful, or that the Tythes were due (for he was not bound to diſcharge him from illegal Suits) the Breach was not well aſſigned. *Cr. El.* 916. *Lovering*'s Caſe. Where a Suit after the Determination of a Term is a Breach of Covenant.

Breach by Diſability.

Declaration, That the Defendant by Indenture 1659, reciting that there was a Leaſe made to the Defendant, and a Recognizance acknowledged by *H. R.* to the Defendant, bearing Date with the ſaid Indenture; the Defendant covenanted, that if *H. R.* pay to the Defendant ſuch a Sum the 24th of *June* 1660, then the ſaid Recognizance ſhould be void; and the Defendant at the Coſts, *&c.* would regrant the Indenture, and deliver the ſaid Recognizance to be cancelled. Plaintiff aſſigns for Breach, that the 21ſt of *October* 1659, the Defendant proſecuted an Extent upon the Recognizance. *Per Cur*, Here is a preſent Breach, for the Diſability by proſecuting an Extent.

Defendant hath disabled himself to deliver up the Recognizance. 5 *Cok.* 20. Sir *Anthony Maine*'s Case. 3 *Cr. Eliz.* 450. *& Popb.* 109. *Idem Casus. Raym.* 25, *Robinson* and *Amps.* 1 *Keb.* 103. 1 *Sid.* 48. *Mesme* Case. *Vid.* 1 *Keb.* 103, 118.

If a Day be limitted to perform a Covenant, if the Covenantor once disable himself to perform it, tho' he be enabled afterwards before the Day, yet the Covenant is broken.

If a Day be limited to perform a Covenant, if the Covenantor once disable himself to perform it, though he be enabled afterwards before the Day, yet the Covenant is broken, as was Sir *Anthony Maine*'s Case. 5 *Rep.* 20. *b. Pop.* 109. *Bendl.* N° 121, 125. Sir *Anthony Maine* demiseth Land to *Scott* for Twenty one Years, and covenants that at any Time during the Life of *Scott*, upon Surrender of his Lease, to make a new Lease, *&c.* and gave an Obligation to perform the Covenants. Sir *Anthony Maine* pleads in Debt upon this Obligation, that *Scott* did not surrender. *Scott* replies, That after the said Demise, Sir *Anthony Maine* had accepted a Fine, *sur conisance de droit come ceo, &c.* and by the said Fine grants and renders the Land to the Conisee for 80 Years. Defendant demurs. *Per Cur'*, 1. Sir *Anthony* by the Fine levied had disabled himself either to take a Surrender, or to make a new Lease, and so has broken his Covenant. 2. Though the first Act was to be done by *Scott*, *viz.* the Surrender, and *Scott* may surrender (if the Term of 80 Years be the Interest of a future Term), yet *Scott* shall have his Action without making any Surrender; for after Surrender Sir *Anthony* cannot make a new Lease, which is the Effect of the Surrender, for he hath disabled himself.

So if he disable himself to perform it in the same Plight.

So if he disable himself to perform it in the same Plight, Feoffee covenants to reinfeoff, and he grants a Rent Charge, marries a Wife, *&c.* This is a Breach of the Condition.

One

One covenants to perform an Award, which is, That he ſhall after deliver an Obligation to another, in which he is bound to him, without limiting any Time when this ſhall be performed. If he bring Debt on the Bond and recover, and after deliver the Obligation; yet this is not any Performance, for he ought to deliver it as it was at the Time of the Award made. 1 *Roll. Abr.* 447. *Nicholls* and *Thomas.* It is a general Rule in Conditions and Covenants, *That if the Plaintiff himſelf be the Cauſe of Diſ-ablement, ſo as the Condition or Covenant cannot be performed, he ſhall not take Advantage of the Condition or Covenant.* Godb. 74. As if I be bounden to pay a Penſion to one till he be promoted to a Benefice, and he diſables himſelf to take the Benefice, I ſhall no longer pay the Penſion. *Godb.* 76. Regula.

Where Breach muſt be aſſigned according to the Words of the Covenant.

A Man covenants upon Payment of 10 *l.* by *J. S.* that *J. S.* ſhall have ſo many Tuns of Copperas, and ſhall enjoy it without lawful Diſturbance of any Perſon. *J. S.* brought Covenant, and ſhews the Payment of the 10 *l.* but that he was interrupted and diſturbed in the Enjoyment of the ſaid Copperas. The Breach is not well aſſigned, becauſe he doth not ſhew by whom he was diſturbed, nor that he was *Legitimo modo*, diſturbed according to the very Words of the Covenant; for though the Plaintiff in Covenant need not ſhew in ſpecial the Title by which he is diſturbed, becauſe by Preſumption he may not know, yet in aſſigning the Breach he ought to purſue the the Words of the Covenant. *Yelv.* 30. *Chaund-*

Diſturbance, not ſaying by whom.

Where the Words of the Covenant ought to be purſued in aſſigning the Breach.

flower

flower and *Preiſtley*, & 3 *Cro. El.* 914. 2 *Cr.* 315. *Plo.* 17.

Debt on Bond to perform Covenants; one of which was, That the Defendant covenanted that he was ſeiſed of an indefeaſible Eſtate in Fee-ſimple. Defendant pleads Covenants performed. Plaintiff replies, He was not ſeiſed of an indefeaſible Eſtate in Fee-ſimple. Defendant demurs generally, becauſe he ſuppoſed the Plaintiff ought to have ſhewed of what Eſtate the Defendant was ſeiſed, in regard that he had departed with all his Writings concerning the Land in Preſumption of Law, and therefore the Plaintiff well knew the Title. And it is not like to *Bradſhaw*'s Caſe; for there the Covenant was with the Leſſee for Years, who had not the Writings. But *per Cur'*, The Breach was well aſſigned according to the Words of the Covenant, and the Plaintiff had Judgment. *Raym.* 14. *Glimingſter* and *Audley*.

Breach aſſigned according to the Words.

Breach may be well aſſigned, though not directly within the Words.

By Covenant in a Charterparty the Parties mutually covenant, That the Maſter of the Ship (who was the Plaintiff) ſhould pay Two Parts of the Port Charges, and the Factor of the Defendant the Third, for all the Voyage. In Action of Covenant the Plaintiff ſhewed, That he ſailed from *London* to *Cadiz*, and there he paid all the Port Charges, and the Two Parts for himſelf, and the other Part for the Defendant; and that the Defendant had not repaid his Part. After Judgment, by *nihil dicit*, and a Writ of Enquiry of Damages returned, Two Exceptions were taken: 1. That here is not

not a ſufficient Breach, for the Defendant was not bound by the Covenant to pay to the Plaintiff the ſaid Third Part, but to the Collector of the Port Charges; and therefore he ought to have ſhewed, that the Defendant had not paid his Third Part, *ſed non alloc'*; for when it is averred that the Plaintiff had paid the Third Part, it ſhall be intended the Defendant had not paid it, and the Plaintiff was neceſſitated in his Default to pay all, otherwiſe the Ship ſhould have been ſtay'd in the Port. 2. It was not alledged, that the Port Charges paid by the Plaintiff were paid in this Voyage. *Per Cur'*, It ſhall be intended to be the ſame Voyage for Payment in the ſame Ports where the ſaid Voyage was alledged to be made. Sir *Tho. Jones* 186. *Bellamy* and *Ruſſell*.

Payment to one, and not to another within the Intent.

In Covenant between *Griffith* and *Goodhand* a Brewer, declaring that the Defendant covenanted with the Plaintiff that he ſhould have all the Grains out of the Braſe that he ſhould brew for Ale and Beer, Seven Parts of Eight, paying a certain Rate for them, *viz.* ſo much for the Grains of Beer, and ſo much for the Grains of Ale: And amongſt other Breaches, ſhews that the Defendant *callide & ſubdole* to defraud the Plaintiff of the Benefit of the ſaid Contract, had mixed Hops with the Braſe Malt that he brewed, ſo that the Grains became bitter and unſerviceable for Fodder for his Cows, *& ſic infregit*. Upon *non infregit* pleaded, Verdict *pro Quer'*, and moved in Arreſt, that the Breach was not well aſſigned; for it was ſaid, That the Grains were delivered, and altho' the Defendant had done ill in mingling Hops with the Braſe, an Action on the Caſe would lie for this Miſfeaſance, yet the Covenant lies not, for this was performed by the De-

Delivery, and the Receipt of the Grains. But *per Cur'*, The Breach was well aſſigned, for the Intent of the Covenant was, That the Grains ſhould be delivered without corrupt Mixture, which would render them unſerviceable; and by this fraudulent Mixture, the Defendant had diſabled himſelf to perform the Intent of the Agreement, he had broke his Covenant. Sir *Thomas Jones*, *Rep.* 191. *Raym.* 464. *id.* Caſe.

Breach aſſigned within the Intent.

Covenant to permit the Plaintiff to enjoy the Lands, and to take the Rents, Iſſues, and Profits of them; and aſſigns the Breach, that ſhe did not ſuffer him to enjoy the ſaid Lands, but had received the Rents, Iſſues, and Profits thereof from the Time of making the Indenture to the Day of the Writ, *&c.* *Per Cur'*, Though he doth not alledge a ſpecial Diſturbance by Entry or otherwiſe, and though he aſſigns the Breach generally that the Defendant received the Rents, *&c.* and ſaith not what, yet it's good; for in Covenant the Breach may be aſſigned as general as the Covenant, though not in Debt on Bond for Performance. *Cr. Car.* 176. *Sims* and *Smith*. *Jones* 218. *idem* Caſe.

Breach aſſigned as general as the Covenant.

Declaration is of a Covenant, whereby the Defendant covenanted to find the Plaintiff with Meat, Drink, Apparel, and other Neceſſaries, and does not ſhew in particular what other Things were neceſſary; and the Breach was aſſigned as general as the Covenant, and ſhews not what other Things are neceſſary, ſo as the Court may judge if it were neceſſary or not. Declaration is ill. *Cr. Jac.* 486. *Mills* and *Aſtell*. 3 *Lev.* 170. *contra*, *Procter* and *Burdet*'s Caſe.

Breach aſſigned as general as the Covenant, yet not good.

Leſſor

Leſſor covenants with his Leſſee for Six Years, That if he be minded to let the Land again after the End of the Term, that the Leſſee ſhall have the Refuſal before another during the Leaſe. He makes a Leaſe to a Stranger for 21 Years to commence preſently, and after the End of the Six Years, Leſſee brought Action of Covenant. It lies not; for tho' it was their Intent, yet the Words are, That if after the Term he would let. So that this ſhall not reſtrain him during the Term. 2 *Roll. Rep.* 332. *Walter* and *Mountague.*

According to the Words, and not according to the Intent.

Breach.

In many Caſes an Endeavour ſhall be eſteemed a Breach or Forfeiture, tho' it take not full Effect.

Covenant not to deviſe to any Perſon but only to his Sons or Daughters, and he deviſeth it to a Stranger and dies, and his Executor never conſents to the Deviſe; yet it's a Breach, for that he hath done all that was in his Power to paſs it away by his Will, and has put it in the Power of the Executor to execute it. *Burton* and *Horton*, *Trin.* 3 *Jac. B. R.*

Deviſe to a Stranger againſt his Covenant, and the Executor aſſents not.

If Grantee of a Reverſion covenants not to grant the Reverſion to *J. S.* If he grant the Reverſion to *J. S.* by his Deed, altho' the Leſſee never attorn, yet this is a Forfeiture; for that he hath done his Endeavour to grant it, and put it in the Power of a Stranger to perfect it. *Burton* and *Horton*'s Caſe.

On Grant of a Reverſion, tho' the Leſſee never attorn.

If Leſſee for Years covenants not to aſſign it, by which it may come to *J. S.* and obligeth him to perform Covenants, and after he aſſigns this to *J. D.* This is a Breach of the Condition, for as

Covenant not to aſſign by which it may come to *J. S.*

as much as by this Means it may come to *J. S. Cumin* and *Richardſon*'s Caſe.

In Covenant, Plaintiff declares upon a Leaſe made by the Queen to *G. B.* and brought the Reverſion to himſelf by divers mean Conveyances, and brought the Term to the Defendant, by a *Que Eſtate* he hath by divers mean Conveyances in general, *concurrentibus iis que in jure requiruntur*, and aſſigns divers Breaches in not repairing of the Premiſſes. The Defendant pleads, *Non infregit conventiones.* Plaintiff demurs, and Judgment *pro Quer'*. 1. The pleading a *Que Eſtate* in a Term in another Perſon, under whom he claims not, but is a Stranger, is good; for he is not privy to the Eſtate and Conveyances in a Stranger. 2. The Plea is too general. *1ſt.* Several Breaches being alledged. *2d.* Two Negatives may not make a good Iſſue, and the Breach is in *non reparando, ideo non infregit*, &c. cannot be good. 3 *Levinz* 19. *Pitt* and *Ruſſell*, *Hill.* 32, 33 *Car.* 2. *Rot.* 503. 3 *H.* 4. 8. *Br. cond'* 85. there was a Covenant between the Leſſor and the Leſſee, That the Leſſor during the Leaſe might be Four Days in a Year in the Houſe without being put out under Pain of 100 *l.* and the Leſſor came to enter, and the Leſſee ſhut the Doors and Windows: It was held, that was no Breach of the Covenant without ſaying, That the Leſſee put him out; cited *Godbolt* 75.

Que Eſtate in a Term pleaded.

Plea too general in alledging ſeveral Breaches.

Covenant to enter, and not to be put out; he came to enter, Leſſee ſhut the Doors and Windows, no Breach.

In Action of Covenant the Plaintiff may aſſign as many Breaches as he will.

In Action of Covenant the Plaintiff may aſſign as many Breaches as he will, tho' not in Debt on Obligation for Performance of Covenant; for in that Caſe there ought to be a Certainty, and certainly to be alledged. *Cro. Car.* 176. *Sims* and *Smith.*

The

The Plaintiff aſſigns three ſeveral Breaches; he ſhall have Judgment for them wherein the Breach is well aſſigned, for they are as ſeveral Actions, eſpecially the Defendant demurring upon the whole Declaration. *Cro. Jac.* 557. *Breſſey* and *Humphreys.*

Three Breaches aſſigned, the Plaintiff ſhall have Judgment for them that are well aſſigned.

Et ſic —— is a ſufficient Averment of the Breach.

Et ſic— a ſufficient Averment of a Breach.

Action of Covenant by an Apprentice, and aſſigns for Breach, that the Teſtator of the Defendant had covenanted to inſtruct the Plaintiff, *&c.* and to find him with Meat and Drink during the Term; and yet the Defendant, after the Teſtator's Death, had put the Plaintiff out of his Houſe and Service; *& ſic*, kept him from Meat and Drink: *Per Cur'*, *Et ſic'* is a ſufficient Averment of the Breach, and it's but Matter of Form, (it was demurred to) 1 *Sid. p.* 216. *Wadſworth* and *Guy*, 1 *Keb.* 761. *Id. Ca.*

In a Charterparty the Defendant covenants to pay to the Plaintiff 3 *l. per* Tun for Goods imported, and the Breach is aſſigned in not paying for ſo many Tuns and one Hogſhead, which comes to ſo much: And upon Demurrer, the Declaration and Breach is ill in aſſigning Non-payment for the Hogſhead, for the Covenant is only to pay ſo much *per* Tun. *Aliter*, had it been to pay *ſecundum Ratam* of ſo much *per* Tun. 2 *Levinz* 124. *Rea* and *Burnet*'s Caſe.

Covenant to pay ſo much *per* Tun; Breach aſſigned in not paying for ſo many Tuns, and one Hogshead, ill.

Breach aſſigned. Vid. *Declaration.*

Teſtator demiſeth Lands, and covenants that the Tenant ſhall quietly enjoy without the Interruption of the Leſſor, or any Perſons claiming under him. Breach is aſſigned, the Defendant pleads *plene adminiſtravit.* The Covenant is,

is, That he ſhall quietly enjoy without the Interruption of the Leſſor, *Vel aliquarum Perſonarum clamantium per præd' Leſſor hered' vel aſſign' ſuos vel per eorum medium conſenſum vel procurationem*; and aſſigns for Breach, that one *Michael Clavell clamans titulum a præd' Leſſore poſtea ſcilt' tali die & tunc*, did enter and eject him. This Breach is not well aſſigned: The Covenant is againſt all Perſons claiming by the Aſſent, Means or Procurement of the Leſſor, but the Breach aſſigned was *clamans titulum* from the Leſſor; now he may claim Title, when as in Truth he had no Title from him, and Judgment was given againſt the Plaintiff: Contingent Covenants ſhall be good, tho' the Executor paid Legacies before the Breach, for he ought to take Security to refund.

Where Breach not well aſſigned by a *clamans titulum*.

Executor pays Legacies before the Breach.

Bond with Condition to perform Articles, which recited where certain Perſons were bound to the Earl of *Holland*, in 8 Bonds, which the Earl had aſſigned to the Defendant to his own Uſe: Now it is agreed, That the Defendant ſhould aſſign theſe Bonds to the Plaintiff to the Plaintiff's own Uſe; and the Defendant covenants that the Money ſhould be paid at the ſeveral Days limited by the Bonds, or within 8 Days after; and the Breach was aſſigned, that the Sum of 50 *l.* payable by one of the ſaid Bonds, was not paid the Plaintiff on the Firſt Day of *March*, which was the Day limited by the Bond, and Iſſue thereon, and found *pro Quer'*. The Replication is inſufficient, for it might be paid within the 8 Days after, and alſo the Condition was for Maintenance, and ſo the Bond is void. *Ailen* 60. *Hodſon* and Sir *Arthur Ingram*.

Covenant to pay at ſuch a Day, or within 8 Days after, Breach aſſigned, that the Sum was not paid at the Day.

In

In Action of Covenant, not to receive any Sums above 100 *l.* but that all ſuch Sums ſhould be paid to *Hinton*; and alſo any Sum received under 100 *l.* he was in convenient Time to pay it to *Hinton*: The Breach was aſſigned in receiving of ſeveral Perſons 20000 *l.* and not paying it over to *Hinton*, it is no ſufficient Breach without ſaying, That he received the Sum of 20000 *l.* by Sums under 100 *l.* or laying the Breach ſolely upon receiving the 20000 *l.* by Sums above 100 *l.* by *Keeling* and *Twiſden*, 2 *Keb.* 338, 339. *Eccleſton* and *Clypſam*, 1 *Sand.* 153. *Meſme Caſe.*

The Caſe, *Knight* and *Keech.* There were mutual Promiſes and Agreements between the Plaintiff and Defendant, which were ſpecially ſet forth in the Declaration: In which the Plaintiff alledged generally, That the Defendant *non performavit agreeamentum ſuum præd'*, without ſhewing a particular Breach After Verdict *pro Quer'*, Error aſſigned was, That the Breach was too general; which being Matter of Subſtance, the Right of the Action could not be tried, and therefore it is not within any of the Statutes of Jeofails: But Judgment was affirmed, becauſe they are mutual; and where Promiſes are executory on both Sides, Performance need not be averred, becauſe it is the Counter-promiſe, and not the Performance raiſeth the Conſideration. *Vid.* 4 *Mod.* 188.

Error of a Judgment in Action of Covenant, to enjoy a Leaſe for Remainder of a Term to come: In Conſideration whereof, the Defendant covenants to pay an annual Rent at ſeveral Feaſts during the Leaſe. The Breaches aſſigned in Non-payment of the annual Rent, *ad ſeperalia Feſta*, during the Reſidue of the Term. *Per Cur'*, it's well enough, as if a Breach had been at every Day. *Contra* in Debt on a Bond to perform.

form. The Certainty of the Days paſt is not neceſſary, eſpecially in the negative Covenant; in which it is ſufficient to produce the general Words, and the reſt may be given in Evidence: And this Breach goes to all the Time paſt, and may be pleaded ſo in Bar of any future Action. The Damage may be given in Evidence for how many Days are, and here it will be intended the Defendant paid it at no Day. 1 *Keb.* 490. *Smith* and *Conyers*, and 468.

Oyer of the Condition to perform Covenants, whereof one was; The Defendant covenanted he was ſeiſed of an indefeaſible Eſtate in Fee-ſimple; and the Defendant pleads, Covenants performed. Plaintiff replies, That he was not ſeiſed of an indefeaſible Eſtate in Fee-ſimple. Defendant demurs generally, becauſe he ſuppoſed that the Plaintiff ought to have ſhewed of what Eſtate. The Defendant was ſeiſed, in regard he had departed with all his Writings concerning the Land in Preſumption of Law, and therefore the Plaintiff well knew the Title. *Per Cur'*, The Breach is well aſſigned according to the Words of the Covenant. *Kay.* 14. *Gliniſter* and *Audley*, and his Caſe before.

Breach aſſigned according to the Words.

Defendant covenants, That he, his Executors and Aſſigns, would repair a Mill let to him: And the Plaintiff alledgeth, that the Mill was defective in Reparations, and the Defendant, his Executors and Aſſigns, did not repair it. Demurrer to the Declaration, becauſe he did not alledge that he, nor his Executors, nor Aſſigns; for if any of them did repair it, the Action lies not. It ought to have been in the Disjunctive, not in the Conjunctive: And of that Opinion was the whole Court; and he ſhall take Advantage of this Fault, tho' it was not aſſigned by the Demurrer. *Cro. Eliz.* 348. *Colt* and *Howe*.

Where the Breach ought to be laid in the Disjunctive, and not in the Conjunctive.

Defen-

Defendant covenants with the Plaintiff to build an Houſe, *ſecundum regulas preſcriptas per Statute pro re-edificatione London*; and aſſigns a Breach, that the Defendant did not cover the Cantilevers with Lead, *ſecundum regulas preſcriptas per Stat. præd'*. Judgment *per* Default, and Writ of Enquiry, and 15 *l.* Damages. It was moved in Arreſt of Judgment, That the Breach was not ſufficiently aſſigned, not alledging in Fact, that the Cantilevers ought to be covered with Lead. But by *Hales*, it being ſaid that he did not cover them with Lead *ſecundum regulas*, &c. this is an Averment that the Statute ſo preſcribes. 2 *Levinz* 85. *Dive* and *Jenman*, 3 *Keb.* 142. *Id.* Ca. Averment ſufficient.

Rawlins and *Vincent*. 1 *W.* & *M. B. R.*

If a Man replies according to the Covenant, it's ſufficient; therefore a Man may aſſign his Breach in the Disjunctive, if the Covenant be ſo, *Stiles* 473. as if the Covenant be, you will make Satisfaction to the Plaintiff or to his Councel, the Aſſignment of the Breach muſt be in the Negative, that he did not make Satisfaction to the Plaintiff, nor to his Councel.

Breach of Covenant aſſigned in Time after the Action brought, is ill. In Debt on Bond, Defendant demands *Oyer* of the Obligation, and it was for Performance of Covenants in an Indenture, and pleads Conditions performed. Plaintiff replies, and aſſigns a Breach in Non-payment of the Rent, 20 *Julii* 17 *Car.* where the Bill was filed, *Trin.* 17 *Car.* which Term ended 14 *Junii*, and ſo the Breach aſſigned after the End of the Term in which the Bill was filed. *Sid.* 307. *Champion* and *Skipwith*, 2 *Keb.* 106. *Id.* Ca. Breach of Covenant aſſigned in Time after the Action brought, is ill.

Action of Covenant on Articles, wherein Breach was assigned, That the Defendant did not pay 20 *l.* during the Time of a Lease made by the Plaintiff to the Defendant at the several Days therein mentioned. Error upon this. *Per Allen*, it is ill, and the Breach must be assigned particularly, so that the other Party may plead to it. *Per Windham*, it is well enough, as if really a Breach had been at every Day. *Contra* in Debt on a Bond to perform, which *Twisden* agreed. Judgment affirmed. 1 *Keb.* 371. *Smith* and *Conyers.*

Breach.

In Debt, the Plaintiff declared of a Deed, comprehending divers Covenants; for the Performance of which, the Defendant obliged himself in the Penalty of 40 *l.* and sets forth, The Defendant had broken the Covenants. Defendant pleads *non est Factum*, and found for the Plaintiff. It was moved in Arrest of Judgment, That tho' the Issue was found *pro Quer'*, yet he having assigned no Breach, no Cause of Action appeared upon the Record, and so he could not have Judgment. Indeed, had the Action been brought upon the Bond of Performance, and *non est Factum* had been pleaded, no Breach needed to have been assigned, for then the Declaration is only upon the Bond, without mentioning any Thing in the Condition, *vid. Rast. Entr.* 162. yet the Court gave Judgment for the Plaintiff, for the Verdict hath aided these Defects. Tho' the Pleading lie broke, all the Covenants would not have been good upon a Demurrer, and that for two Reasons: 1. Because it would have been double, in regard the Breach of any one of them would have intitled the Plaintiff

Where and in what Case Breach need not be assigned.

Plea, that the Defendant broke all the Covenants.

ſiff to the Penalty. 2. For that ſome of the Covenants were ſuch as he ought to have aſſigned on a Special Breach, and upon that might have been the Judgment of the Court: But the Verdict hath aided theſe Defects. 1 *Ventr.* 114, 126, *Barnard* and *Mallet.*

Per Hales, C. J. In this Caſe he conceived the Declaration ill on Demurrer, becauſe for a Penalty a Man can aſſign but one Breach, and the Condition Precedent muſt be averred; but being generally alledged, that he had not performed any Covenants, it's only multifarious, which is aided by taking Iſſue on *non eſt Factum*; which the Court agreed, and that the Merit of the Cauſe is tried, and ſo it's aided by the late *Stat.* 17 *Car.* 2. *c.* 8. Judgment *pro Quer'*, 2 *Keb.* 766.

For a Penalty a Man can aſſign but one Breach.

Stat. 17 *Car.* 2. *c.* 8.

Breach by Conſtruction.

A Covenant not to aſſign a Thing in Action to any Perſon or Perſons whatſoever. An Aſſignment in Equity, is a Breach of the Covenant; for in Law no Aſſignment can be of a Thing in Action, therefore the Intent of the Covenant muſt be of ſuch an Aſſignment as can be, and that is in Equity. *Raym.* 459, 460, 461.

Plaintiff declares, That the Defendant had covenanted to pay him ſo much Money as he ſhould expend for Repairing and Victualling a Ship for him; and avers, That he had ſpent 300 *l.* in Repairing and Victualling of it, and that he gave the Defendant Notice of it ſuch a Day; and for Non-payment, brings the Action. Defendant demurs, becauſe he had not averred a Special Breach of Covenant. But *per Cur'*, this hath been often over-ruled. *Stiles*, *p.* 31. *ſic non tenuit conventionem in hoc.*

Where a Special Breach of Covenant need not be averred.

In ſome Caſes one need not be very particular in aſſigning a Breach.

In ſome Caſes a Man need not be very particular in aſſigning of a Breach. A Breach was aſſigned for not Repairing the Mill and the Mill-Banks, and for not leaving the Mill-ſtones, and did not ſhew in what Vill the Mill-Banks were; and need not, for it ſhall be intended to be in the ſame Vill where the Mill is; and ſhews not whether it was a Corn-Mill, or a Fulling Mill; but that is all one, the Breach being aſſigned for not Repairing.

Note, There were Three Breaches aſſigned, and the Defendant having demurred to the whole Declaration, the Plaintiff ſhall have Judgment without Queſtion for them wherein the Breach was aſſigned, for they are as ſeveral Actions; and indeed they were all well aſſigned. *Cro. Jac.* 557. *Breſſey* and *Humphreys*. Devant.

City of Exeter verſus *Clare*.

A Covenant in the ſame Indenture pleaded in Bar of the reſt.

In Debt for Rent. Defendant pleads a Covenant in the ſame Indenture in Bar of the whole Rent, That in caſe of Land-charges the City covenanted to abate 40 *l. per Annum* ſo long as they continued. Plaintiff demurs. *Per Cur'*, This is only a Plea as to ſo much, not to the whole Rent. Alſo *Wild* held this a reciprocal Covenant alſo: *Sed per Cur'*, being in the ſame Indenture, it's pleadable as an Agreement in Bar of ſo much; and Judgment *pro Quer'*. 3 *Keb.* 331.

Reciprocal.

Præmiſſa & Prædimiſſa.

The Breach was aſſigned in ſuch a Houſe, Parcel *Præmiſſorum* to him aſſigned, and ſaith not *Præmiſſorum Prædimiſſorum* (there being divers Things excepted in the Leaſe, and this might be Parcel of the Things excepted): But *per Cur'*, *Præmiſſa* ſhall be intended *Prædimiſſa*, and

and ſhall not extend to any Lands not *dimiſſa*. *Cro. Car.* 221. *Congham* and *King*.

Covenant is, That *A.* and *B.* and *C.* ſhall pay, and the Breach aſſigned was, That the Defendant did not pay: He need not ſay, Nor any of the others: And the Court allowed this Difference. If the Action had been brought againſt all, then the Non-payment in all ſhall be alledged; otherwiſe, if againſt one only, it ſufficeth that he hath not paid. *Latch.* 50. *Conſtable's* Caſe.

Tho' the Breach be not alledged ſo full and formal, yet it may be good: As *Licet* the Teſtator entered, inſtead of, *Quod idem tamen le Teſtator*, &c. *Cro. Jac.* 383. Lady *Platt's* Caſe. *Licet.*

It ſufficeth to aſſign the Breach as general as the Covenant is. It ſufficeth to aſſign the Breach as general as the Covenant is.

Leſſee covenants to repair the Houſe well from Time to Time, during the Term; and at the End of the Term, to leave the ſame well repaired to the Leſſor: And aſſigns for Breach, That he did not leave it well repaired at the End of the Term. The Breach is good, tho' he doth not ſhew in what Point it was not well repaired; But if the Defendant had pleaded, That at the End of the Term he had delivered it up well repaired, then if the Plaintiff will aſſign any Breach, he ought to ſhew in what Point particularly it was not repaired, ſo as the Defendant might give a particular Anſwer to it. *Cro. Jac.* 170. *Hancock* and *Feild*. *Noy* 123.

So the Defendant let the Manor of *S.* by Indenture for 10 Years, and covenanted that he had lawful Right and Eſtate to let it for that Term; and aſſigns for Breach, That he had not Right nor lawful Eſtate to let it, and ſo broke his Covenant. It's well aſſigned, tho' it is not ſhewed that they had an Eſtate, nor how the

Leſſor had any Right, or that a Stranger had ejected him by Title: For the Covenant being general, the Breach may be aſſigned as general as the Covenant; and it lies not in the Plaintiff's Notice, who had the rightful Eſtate: But the Defendant ought to have maintained, That he was ſeiſed in Fee, and had a good Eſtate to demiſe; and then the Plaintiff ought to have ſhewed a ſpecial Title in ſome other. *Cro. Jac.* 304. *Salmon* and *Bradſhaw*, and 9 *Rep.* 60. b.

Leſſor covenants, That he was then lawfully ſeiſed in Fee of an Indefeaſible Eſtate. Plaintiff in his Declaration in *facto dicit*, that at the Time of the making of the Indenture he was not lawfully ſeiſed in Fee, and ſo he had not performed the ſaid Covenant. Defendant pleads *non eſt Factum*; the Breach is well aſſigned, tho' he ſhews not that any other was ſeiſed, becauſe the Covenant is general, ſo the Breach may be aſſigned as general, eſpecially as this Caſe is, where the Defendant has made the Declaration good by his pleading *non eſt Factum*. So he allows the Breach, if it had been his Deed. *Cro. Jac.* 369. *M*—— and *Ballet*.

Declaration made good by pleading *Non eſt Factum*.

But in *Cro. Jac.* 486. *Mills* and *Aſtell*'s Caſe, the Declaration is of a Covenant, whereby the Defendant covenanted to find the Plaintiff with Meat and Drink, and other Neceſſaries, and doth not ſhew in particular what other Things were neceſſary, and the Breach was aſſigned as general as the Covenant, and it was adjudged ill, becauſe he ſhewed not what were Neceſſaries. *Dev.*

A good

A good Breach may be aſſigned, tho' not directly within the Words.

By Covenant in a Charterparty, the Parties mutually covenant, That the Maſter of the Ship (who is the Plaintiff) ſhall pay two Parts of the Port-Charges, and the Factor of the Defendant the third for all the Voyage. In Action of Covenant the Plaintiff ſhews, That he ſailed his Ship from *London* to *Cadiz*, and there he paid all the Port-Charges, and the two Parts for himſelf, and the other Part for the Defendant, and that the Defendant had not repaid him his Part. After Judgment by *Nihil dicit*, and Writ of Enquiry of Damages returned, theſe Exceptions were taken.

1. That here is not any ſufficient Breach, for the Defendant was not bound by the Covenant to pay to the Plaintiff the third Part, but to the Collector of the Port-Charges, and there he ought to have ſhewed that the Defendant had not paid his third Part: *Sed non allocatur:* For when it is averred, That the Plaintiff had paid the third Part, it ſhall be intended that the Defendant had not paid it, and the Plaintiff was neceſſitated in his Default to pay the whole, otherwiſe the Ship ſhould be ſtayed in the Port.

2. It is not alledged that the Port-Charges paid by the Plaintiff, were paid in this Voyage. *Per Cur'*, It ſhall be intended to be the ſame Voyage. Sir *Tho. Jones*, *p.* 186. *Bellamy* and *Ruſſell*; and ſo it may be a good Breach, tho' not directly within the Words, as is the Caſe of *Goodhand* and *Griffith*, Sir *Tho Jones* 191. The Declaration was, That the Defendant (who was

Covenant Caſe.

was a Brewer) covenants with the Plaintiff, that he ſhall have all the Grains that ſhould proceed out of the Copper that he ſhould brew for Ale or Beer, ſeven Parts in eight, paying a certain Rate for them, (that is to ſay) ſo much for the Grains and Beer, and ſo much for Ale; and amongſt other Breaches, ſhews that the Defendant, *ſubdole & callide*, to defraud the Plaintiff of the Benefit of the ſaid Contract, mixed Hops in the [Braſe, or Malt] that he brewed; ſo that the Grains became bitter, and unſerviceable Fodder for his Cows, and ſo a Breach. The Defendant pleaded *Non infregit*, and had a Verdict. It was moved, that the Breach was not well aſſigned, for that the Grains were delivered; and tho' the Defendant had done ill in mixing the Hops, yet no Action of Covenant lies, for this was performed by the Delivery, and received Part of the Grains, and Action of the Caſe would lie. *Per Cur'*, The Breach is well aſſigned, for the Intent of the Covenant was, that the Grains ſhould be delivered without any corrupt Mixture which ſhould render them unſerviceable, and ſo he had broke his Covenant. Sir *Tho. Jones* 191.

Per Stat. 8 & 9 *W.* 3. *c.* 11. In all Actions after 25 *March* 1697. proſecuted in any of the King's Courts of Record, upon any Bond or Penal Sum for Non-performance of Covenants, the Plaintiff may aſſign as many Breaches as he ſhall think fit; and the Jury at the Trial ſhall and may aſſeſs Damages for ſuch of the ſaid Breaches ſo aſſigned, as the Plaintiff at the Trial ſhall prove broken, and the like Judgment ſhall be entered on ſuch Verdict, as hath been uſually done in ſuch Action; and if Judgment ſhall be given for the Plaintiff upon Demurrer,

The Plaintiff may aſſign as many Breaches as he ſhall think fit.

murrer, Confeſſion, or *Nihil dicit*, the Plaintiff upon the Roll may ſuggeſt as many Breaches as he ſhall think fit; upon which ſhall iſſue a Writ to ſummon a Jury to appear at the Aſſizes in that reſpective County, to enquire of the Truth of every one of the ſaid Breaches, and to aſſeſs Damages accordingly; and the Juſtices of Aſſize ſhall make Retorn thereof to the Court from whence the ſame iſſued. In caſe the Defendant after ſuch Judgment entered, and before Execution executed, ſhall pay into Court ſuch Damages ſo aſſeſſed, and Coſts of Suit, a Stay of Execution ſhall be entered upon Record.

Judgment *pro* Plaintiff on Demurrer, Confeſſion, or *Nihil dicit*; the Plaintiff on the Roll may ſuggeſt Breaches, and a Writ of Enquiry of Damages.

Or if by reaſon of Execution executed, the Plaintiff, or his Executors, or Adminiſtrators, ſhall be fully paid all ſuch Damages, together with his Coſts, and reaſonable Charges, the Body, Lands, and Goods of the Defendant, ſhall be forthwith diſcharged, and the Satisfaction entered upon Record.

Yet ſhall ſuch Judgment ſtand, and be as a farther Security to anſwer to the Plaintiff, his Executors, *&c.* ſuch Damages as ſhall or may be ſuſtained for farther Breach of any Covenant in the ſame Deed or Covenant contained; upon which the Plaintiff, *&c.* may have a *Scire fac'* upon the ſaid Judgment againſt the Defendant, his Heirs, Tertenants, Executors or Adminiſtrators, ſuggeſting other Breaches, and to ſummon them to ſhew Cauſe why Execution ſhall not be awarded upon the ſaid Judgment; upon which there ſhall be the like Proceedings, as aforeſaid, and upon Payment of Damages and Coſts, Proceedings to be again ſtayed, and ſo *toties quoties*, and the Defendant diſcharged out of Execution.

The Judgment ſhall ſtand as a further Security to anſwer Damages for a further Breach; and *Scire fac'*.

Action

Action of Covenant on Articles, wherein Breach was assigned, That the Defendant did not pay 20 *l.* during the Time of a Lease made by the Plaintiff to the Defendant, at the several Days therein mentioned. Which by *Allen* is ill, and the Breach must be assigned particularly, so that the other Party may plead to it. *Windham* said, it's well enough, as if really a Breach had been at every Day. *Contra* in Debt on a Bond to perform, which *Twisden* agreed. This was in Error of a Judgment in *Durham*: Judgment affirmed. 1 *Keb.* 371. 1 *Lev.* 78. and 1 *Keb.* 468. *Vide Smith* and *Coniers.*

CHAP.

CHAP. XLII.

Pleading: Vide *Sparſim, under each Title.*

ON *Oyer* of the Condition it was for Performance of Articles, and then he pleads the Articles, and that he had performed them. The Plaintiff prays, that the Articles *irrotulentur in hæc verba*; which being done, the Plaintiff demurs generally, and now ſhewed for Cauſe, That the Defendant in pleading the Articles had omitted Part of them. *Et Opinio Cur'* was againſt the Defendant; for perhaps the Plaintiff would have aſſigned a Breach upon the Things omitted, of which he is deprived by this Means. 3 *Lev.* 50. *Hudſon* and *Spier. H.* 33 *Car.* 2. *C. B. Rot.* 421.

Covenant upon Indenture of Leaſe, and aſſigns a Breach in Nonpayment of the Rent, according to the Covenant in the Indenture. Defendant pleads *nil debet*. Plaintiff demurs generally, *& per tot' Cur' nil debet* is no Plea in this Caſe upon the Indenture. 3 *Lev.* 170. *Tyndall* and *Hutchenſon.*

Debt for Rent upon Indenture, the Plea of *nil debet* not good.

In Covenant upon Warranty of Lands for Years, the Plaintiff ought to ſhew what Eſtate or Right he which enter'd into the Lands had at the Time of his Entry; and it is not ſufficient to aver, that he had good Title. 2 *Sand.* 178, 179, 180, 181. *Wotton* and *Hele. Idem Caſus*, 1 *Keb.* 301. 1 *Mod.* 66. 1 *Lev.* 301.

Where it muſt be ſhewed what Eſtate or Right he who entered into the Land had at the Time of his Entry.

If

In Demurrer upon the whole Declaration the Plaintiff ſhall have Judgment for the Breaches well aſſigned.

If Action of Covenant be brought, and divers Breaches be aſſigned, and ſome are good and others ill; if the Defendant demur upon the entire Declaration, the Plaintiff ſhall have Judgment for thoſe Breaches which are well aſſigned, and ſhall be barred for the Reſidue. 2 *Sand.* 380. on *Pinkney's* Caſe.

Covenant in the ſame Deed pleadable in Debt for Rent; and why.

Debt for Rent upon a Leaſe for Years: Defendant pleads in Bar a Covenant *per* the Leſſor, that the Leſſee ſhall deduct ſo much for Charges. *Per Cur'*, The Covenant being in the ſame Deed is well pleadable in Bar, the Thing being executory, and the Party ſhall not be put to a Circuity of Action, and to bring Action upon his Covenant. 1 *Lev.* 152. *Johnſon* and *Car.*

Leaſe by Eſtoppel.

If a Man let Land to me by Indenture, which is the Land of *J. S.* who is then alſo ſeiſed of the Land, and after I enter upon *J. S.* who after re-enters, whereupon I bring my Writ of Covenant, the Leſſor cannot ſay that I was not in the Land by his Demiſe, although I was a Diſſeiſor to *J. S.* by my Entry; for the Leſſor is eſtopped to ſay this, in as much as this was a Leaſe by Eſtoppel againſt him. 1 *Roll. Abr.* 874. *Stiles* and *Herring.*

The Plaintiff declares upon an Indenture dated the 7th of *Sept.* 1657. whereby the Defendant covenants, That he and one *T. W.* would deliver to the Plaintiff ſo many Maunds of *Salt-petre* at ſuch a Rate before the 20th of *October* next enſuing, the Plaintiff paying ſo much a Maund; and to the Performance thereof, the Defendant binds himſelf in 500 *l.* Defendant demands *Oyer* of the Deed; and it appears that between the ſaid Covenant and the Obligation there is a *Proviſo*, That if the Defendant ſhould between that and the 20th of

October

October be disabled by the Sea, *&c.* to deliver the *Salt-petre*, then the Deed should be void. Defendant pleads, That he had prepared the *Salt-petre*, and that the Boat wherein it was put was cast away. Plaintiff replies, That the Defendant had sufficient *Salt-petre* over and above what was cast away. Issue thereupon, and found *pro Quer'*. *Per Cur'*, The Action is brought upon the Covenant, and not upon the Penalty, and the reciting of the Penalty is but Surplusage. 2. The Declaration is sufficient without Recital of the *Proviso*, according to *Ughtred*'s Case, and the Defendant ought to plead the *Proviso*. *Raym.* 65. *Elicot* and *Blake*. *Devant*.

Action brought upon the Covenant, and not upon the Penalty.

In Covenant with a *Proviso*, the Declaration good without Recital of the *Proviso*.

Debt on Bond conditioned to perform Covenants, one of which was for Payment of so much Money upon making such Assurances. The Defendant pleads he paid the Money at such a Day, but does not mention when the Assurance was made, that it might appear to the Court that the Money was immediately paid pursuant to the Condition; and for that Reason the Court were all of Opinion, That that Plea was not good, and Judgment for the Plaintiff upon Demurrer. 2 *Mod.* 33. *Duck* and *Vincent*.

Covenant to pay Money on making Assurances, Defendant pleads Payment, but saith not when the Assurances were made.

Defendant *Lane* married *Dudly Gory* Daughter of the Plaintiff, and had 3000 *l.* in Marriage, and covenants within a Year to make an Assurance of Lands, within the Realm of *England*, of the Value of 400 *l. per Ann.* to Sir *Arthur Gory* for a Jointure, in such Manner as Sir *H. Yelverton* and Serjeant *Crew* shall devise. Defendant pleads in Performance of this Covenant, That at such a Time he was seised of 400 *l. per Ann.* and he informed Sir *Arthur Gory* of it, and that Sir *Arthur* did not require

him to make the ſaid Jointure. This Plea is ill, for Four Cauſes:

Notice.

1. He ought to have given Notice to Sir *H. Yelverton* and Serjeant *Crew*, becauſe they are named: *Aliter*, had it been as the Councel of the ſaid Sir *Arthur* ſhould appoint, then it ſhould have been given to the Party.

Place of Notice iſſuable.

2. He ſhews not the Place of Notice, and that is iſſuable.

3. He ſhews not where the Lands lie, whether in *England*, or not.

Plead that he was ſeiſed of a Freehold, and ſhews not of what Eſtate.

4. He ſaith he was ſeiſed of a Freehold, but ſhews not of what Eſtate, and perhaps it was only for Life. 2 *Roll. Rep.* 333. Sir *Arthur Gory* and Sir *Robert Lane.*

In Action of Covenant, the Plaintiff declared upon the Indenture of Covenant; and the Covenant was, That a Ship ſhall go with the next fair Wind, and that the Merchant ſhall pay ſo much for Freight. Defendant ſaith, by Way of Traverſe, That he did not go with the next fair Wind. And *per Cur'*, The Traverſe is not good, for that which is material ſhall be traverſed, and that is, that the Ship did not go at all. *Poph* 161. *Conſtable* and *Clobery*. *Latch* 12. *Idem Caſus.*

Traverſe material.

Warrantia Charta depending, no Plea.

Warantia Charta depending, is no Plea in Covenant, for they are of different Nature; one is real, and ſhall bind the Land which the Leſſor had at the Time of the Judgment; the other is perſonal, and for which he only ſhall have Dammages. *Yelv.* 139. *Hob.* 3. 1 *Roll. Rep.* 25. *meſme Caſe.*

In

In Debt on Bond for Performance of Covenants, if the Defendant plead generally the Performance of the Covenants, and the Plaintiff doth demur generally upon it without ſhewing Cauſe of Demurrer, Judgment ſhall be given according to the Truth of the Caſe; for that Default of Pleading is but Matter of Form, and is aided by *Stat.* 27 *Eliz.* But if any of the Covenants be in the Disjunctive, ſo as it is in the Election of the Covenantor to do the one or the other, then it ought to be ſpecially pleaded, and the Performance of it, for otherwiſe the Court cannot know what Part hath been performed. 1 *Leon.* 311. *Oglethorp* and *Hide.*

Defendant pleads Performance general: Plaintiff demurs generally. How Judgment ſhall be given.

Pleading of Covenants in the Disjunctive.

Requeſt is traverſable in Covenant, where the Covenant is to be performed upon Requeſt. 2 *Leon.* 5.

Requeſt where traverſable.

Covenant was, That whereas *E. T.* had bargained to the Plaintiff a Cloſe; and whereas the ſaid *E. T.* hath already morgaged to *J. S.* divers Lands in *G.* whereby the ſaid Cloſe is morgaged, or ſuppoſed to be morgaged, to redeem and ſet free the ſaid Cloſe by a Day. Defendant pleads, the Cloſe was not morgaged, *Et ſic dicit quod clauſum præd' fuit redempt' liberat' & exonerat'.* Plaintiff replies, That the Cloſe was morgaged to *J. S.* and found for the Plaintiff upon this Iſſue. *Per Cur'*, It is a good Replication, tho' he ſaith not *Quod pignorat' fuit* to the ſaid *J. S.* and is not redeemed, for it might be redeemed before the Day. The Defendant hath offered a particular Point in Iſſue, that it was not morgaged; and the Plaintiff anſwers it when he ſaith it was morgaged, and need not alledge that it was not redeemed; for there ſhall never be intended any Redemption, becauſe the Defendant pleads it was not morgaged. A ſpecial

The Plaintiff need not to anſwer the particular Point put in Iſſue by the Defendant.

Plea in Bar is always anſwered with a ſpecial Replication in the Point alledged. The Difference is, ſuch Pleading ſhall be good after Verdict, but not if demurred to. *Yel.* 24. *Bayly* and *Taylor*. *Cro. El.* 899. *meſme* Caſe.

Averment of Performance, where it muſt or need not. *Vid.* 1 *Lut.* 249. *& hic ſub Tit.* Releaſe.

Concord pleaded.

Covenant upon Indenture, by which the Defendant covenants to permit the Plaintiff to receive 100 *l. per Ann.* Rent, whereof 60 *l. per Ann.* for Payment of a Debt, the Reſidue to be paid by the Defendant, and aſſigns a Breach in Diſturbance by the Defendant to receive the Rent. Defendant pleads a Concord between the Plaintiff and Defendant, that each of them ſhould deliver his Part of the Indenture to the other to be cancelled into the Hands of a Third Perſon, and that each ſhould be exonerated of all Actions upon the Indenture; and avers, the Defendant delivered his Part to the Third Perſon. Plaintiff demurs, and Judgment for him; for Concord is no Plea, if it be not executed on both Parts. 3 *Lev.* 189. *Ruſſell*'s Caſe.

Concord not pleadable, if it be not executed on both Parts.

Leſſee covenanted for him and his Aſſigns to repair and maintain the Houſes in Reparation from Time to Time during the Term, and ſhews that the Leſſee aſſigned all his Term to the Defendant, and for Default of Reparations after the Aſſignment he brought the Action. Defendant pleads, That after the Decay he made ſuch a Concord that the Plaintiff ſhould have 30 *s.* and ſuch Goods, in Satisfaction of that Deſtruction, *&c.* and ſhews it to be executed. It was demurred; for the Action being grounded upon a Deed, cannot be diſcharged by a Deed. But *per Cur'*, The Plea

Action grounded on a Deed cannot be diſcharged by a Contract.

is

is good; for it is not pleaded in Diſcharge of the Covenant, but only for the Damages which are demanded by reaſon of the Breach of the Covenant, and the Covenant remains: And this Plea ſounds only in diſcharge of the Defendant, and is not like to the Caſe of an Obligation with a Condition, which cannot be diſcharged by a Contract, for there it is a Duty certain. And in every Action where only Amends is demanded by Way of Damages, Accord executed is a good Bar in Diſcharge of them. *Cro. Jac.* 49. *Alden* and *Blayne*.

Where a Parol Concord is good.

Action of Covenant to perform Articles, and pay Money; Defendant pleads Payment of the Money (5 *l.*) after the Day, which the Plaintiff accepted in Satisfaction of 50 *l.* which not being pleaded by Way of Accord and Satisfaction of the Covenant is ill, wherein Damages alſo are recoverable. Iſſue was for the Defendant, who pleaded it. But *per Cur'*, There being a full Iſſue on an Affirmative and a Negative it is well enough, as if it had been pleaded in Satisfaction of Breach of Covenants. And here it's Tantamount, being in Satisfaction of the Thing covenanted to be done, and no Repleader was awarded, but Judgment *pro* Defendant, 1 *Keb.* 210, 246. *Matthews* and *Raymond*.

Plea not good by Way of Accord and Satisfaction.

A Man made a Leaſe of Land for Years by Deed, and covenanted, That the Leſſee and his Aſſigns ſhall enjoy it during the Term. Leſſor makes the Defendant his Executor, and dies. The Leſſee aſſigns over his Term. A Stranger enters upon the Aſſignee; the Aſſignee takes 40 *l.* in Satisfaction of his being ejected of the Aſſignor, and afterwards brings Action of Covenant againſt the Executor of the Leſſor, the Defendant. The Defendant

40 *l.* accepted in Satisfaction of his being ejected, *&c.*

pleads the Acceptance of the 40 *l.* of the Aſſignor in Satisfaction of the Wrong done to him, in Bar of the Action. Plaintiff demurs. *Rolls*: Here are Two Covenants, one of the Leſſor, and one of the Aſſignor, and therefore the Party may have Two Actions; and therefore he is not here barred to bring this ſecond Action, though he hath barred himſelf by the Acceptance of the 40 *l.* from bringing Action againſt the Aſſignor, and the Defendant hath not pleaded that the 40 *l.* was given in Satisfaction of the Covenant, for then it had been otherwiſe. *Stiles* 300. *Whitway* and *Pinſent*.

In 2 Actions, one againſt the Aſſignor, and the other againſt the Executor of the Leſſor.

Without a Deed, becauſe this enures as a Releaſe of the Covenant, which may not be without a Deed. But in Satisfaction and Performance of a Thing to be done, Accord with Satisfaction is a good Plea without a Deed. And in *Blake*'s Caſe, Payment of Money is no Plea in diſcharge of a Bond, but in diſcharge of Money to be paid by Bond. So pleaded in *Peto*'s Caſe, 9 *Rep.* and becauſe Accord with Satisfaction was pleaded in Satisfaction of the Entry and not of the Covenant, it was held a good Plea. *Dodderidge* admitted, That it ſhall not be a good Plea for the Two Entries made after the Accord, becauſe as to them the Covenant was not broken at the Time of the Accord; but it is clearly good for the firſt Entry before the Accord, and the Plaintiff cannot have Judgment for the other Two Entries upon this Action: And Judgment *pro Deft'*.

To be a Deed of Diſcharge.

In Covenant, Plaintiff aſſigned a Breach in not paying 8 *l. per Ann.* and, 2. In not purchaſing Lands worth 100 *l.* Defendant pleads Accord, and that he had paid Part, and ſaith not how much. *Per Cur'*, Accord is a good Plea to a Covenant to pay a Sum certain, or

or an Obligation when joined with other Things uncertain; but this Accord not mentioning what Part he had paid in certain, is void. 2 *Keb.* 51. *Outram* and *Relſton.*

Covenant brought by the Heir in Reverſion againſt the Executor of Tenant for Life, for Breach of a Covenant in the Teſtator in not repairing an Houſe. Defendant pleads, the Teſtator died 19 *March*, and that the 22d of *March*, *concordat' & agreeat' fuit inter le* Plaintiff and Defendant, that the Defendant ſhould quietly depart, and leave Poſſeſſion to the Plaintiff; and in *conſiderat' inde* the Plaintiff agreed to diſcharge him of the Breach in *non reparando*: And ſhews, that on the 25th of *March* he did quietly depart, and ſhews an Excution of the Concord as he ſuppoſed. Plaintiff demurs. Plea is not good, becauſe the Time is uncertain upon this Agreement when he ſhall depart; and although the Defendant ſhews he did depart within Five Days after, yet this ſhall not aid the firſt Uncertainty; for the Concord is the Foundation of the whole, which ought to be certain when it ſhall be performed. *Yel.* 124. *Sanford* and *Cutcleft.* Concord pleaded.

Accord with Satisfaction by Deed ſhall be a good Plea in diſcharge of a Covenant, as well before Breach as after, becauſe it is an Action meerly perſonal, wherein Damages ſhall only be recovered. *Palmer* 110. *Roberts* and *Stoker.*

Leſſor covenants, That his Leſſee ſhall enjoy his Leaſe peaceably during his Term, and that the Leſſor ſhall not make any Entry upon him during that Time. The Leſſor enters Three Years after, and the Leſſee brought Action of Covenant, and alledgeth Three

Accord with Satisfaction after Covenant broken, is a good Bar; ſo if it be before, if the Covenant before Payment of Money; but in other Caſes there ought.

Breaches. Defendant pleads Accord with Satisfaction in Performance, and Satisfaction of this Covenant after the firſt Entry, and before the Two other Entries. *Per Haughton*, Accord with Satisfaction is no Plea in diſcharge of a Covenant.

In Covenant, the Breaches aſſigned were, That the Houſes were not in repair, that the Locks were taken away, and that the Hedges were broken down, and the Ditches unſcour'd. The Defendant pleads an Agreement made between the Plaintiff and him, That he ſhould employ a Workman Three or Four Days in and about the Repairing the Houſe, which ſhould be a ſufficient Satisfaction, and that he employed a Workman, *&c.* Upon this Plea they were at Iſſue, and a Verdict for the Defendant. Exceptions were taken in Arreſt of Judgment; 1. Where Accord and Satisfaction is pleaded, it muſt be real; but in this Caſe, it was no more than the Defendant was obliged to do. 2. There are ſeveral Breaches aſſigned, and the Defendant has only anſwered the Repairs of the Houſe; and ſo it is a Diſcontinuance in Pleading, which is not aided by a Verdict. 3. The Satisfaction is uncertain, *viz.* to employ a Man to work for Three or Four Days; and for theſe Reaſons, Judgment was ſtay'd.

Curia. In Covenant where Damages be uncertain, and to be recovered, as in this Caſe, a leſſer Thing may be done in Satisfaction, and there Accord and Satisfaction is a good Plea; but in Action of Debt upon a Bond, where the Sum to be paid is certain, there a leſſer Sum cannot be paid in Satisfaction of a greater. 4 *Mod.* 88. *Adams* and *Tapling*.

Action

Action of Covenant to perform Articles and Payment of Money: The Defendant pleaded Payment of the Money after the Day, which the Plaintiff accepted, which being not pleaded by Way of Accord and Satisfaction of the Covenant, wherein Damages are alſo recoverable, is ill. *Hil.* 13 *Car.* 2. *B. R. Raymond* and *Matthews.*

Bar by Accord in Satisfaction, the Concord was pleaded to be in Satisfaction of the Covenants before any Breach of Covenants: This is no good Bar; for the Covenants being created by Deed, may not be diſcharged but by Deed; but Accord with Satisfaction is a good Plea in Satisfaction and Diſcharge of Damages in Covenants broken, and Judgment given accordingly againſt the Opinion in *Rabbet* and *Stoker*'s Caſe, 2 *Rolls Rep.* 187. *Vid.* 2 *Cr.* 99. *Alden* and *Blagues.* 1 *Pal.* 110. *Robards* and *Stoker*'s Caſe.

Debt on Bond for Performance of Covenants in Articles of Agreement; in which it was recited, That whereas the now Defendant had found out a Myſtery in colouring Stuffs, and had entered into a Partnerſhip with the Plaintiff for the Term of Seven Years, he did thereupon covenant with him, that he would not procure any Perſon to obtain Letters Patents within that Term, to exerciſe that Myſtery alone. Defendant pleaded, he did not procure any Perſon to obtain Letters Patents, *&c.* The Plaintiff replies, and aſſigned for Breach, That the Defendant did within that Term procure Letters Patents for another Perſon to uſe that Myſtery alone for a certain Time, *Et hoc petit quod inquiratur*, &c. Defendant demurs; 1. The Plaintiff ſets not forth what Term is contained in the Letters Patents: But *per Cur'*,

He being a Stranger to them, need not. 2. He hath pleaded both Record and Fact together, for the Procuring is the Fact, and the Letters Patents are the Record, and then he ought not to have concluded to the County. But *per Cur'*, The Procuring is the Matter upon which the Breach ariſeth, and not the Letters Patents; ſo that it was improper to conclude, *Prout patet per Record'*. 3 *Mod.* 79. *Clerk* and *Hoskins*.

Action of Debt; Defendant pleaded it was for Performance of Covenants, and that he hath performed all, not ſhewing forth the Indenture. To which the Plaintiff demurred, as *Syderton verſus Nicherton*, and *Day verſus Lambert*, expreſly he muſt ſet forth; which the Court agreed to, and made it as a Rule. 1 *Sid.* 97. 1 *Keb.* 380, 415. *Lewis* and *Bull.*

In other Pleadings.

Deed of Covenant on the Demiſe of an Houſe: The Count is only *quod fregit*, and *non eſt factum* is pleaded, and Iſſue is, *quod non eſt factum*. Here is no particular Breach aſſigned, but only he declares generally *quod fregit*, it being a Deed with Covenants (and not an Obligation generally), and a *Peine Subſequent* on Non performance thereof: But being after a Verdict, as *Raſt. Entries* 162. it's well enough, a certain Sum being demanded [in Debt], the Want of a Breach is ſupplied by *Non eſt factum*, upon the late Stat. 17 *Car.* 2. 2 *Keb.* 754. *Burnard* and *Michell*. *Vide* the Caſe, 1 *Vent.* 114, 126. *Vide ſupra Tit.* Breach.

The Want of a Breach ſupplied by *Non eſt factum*.

Covenant

Covenant was brought, for that the Defendant did not pay a Rent with which the Land was charged. Defendant replies, he was to enjoy the Land ſufficiently ſaved harmleſs, and anſwers not the Breach. *Per Tot. Cur'*, It's an ill Bar, 1 *Brownl.* 22. *Cowling* and *Drury*. Covenant to pay Rent. Defendant pleads he was to enjoy the Land ſufficiently ſaved harmleſs.

In Action of Covenant to deliver Iron, Defendant pleads Two Pleas iſſuable, *viz.* A Delivery of the Iron according to his Covenant; and by the Third Plea he pleads a Concord. Upon this the Plaintiff demurs generally, *Et dicit quod placitum prædict' eſt minus ſufficien', &c. Per Cur'*, This is a Diſcontinuance of all the Matter; for this Word [*Placitum*] is uncertain to which of the ſaid Three Pleas it ſhall refer; ſo as to Two Pleas pleaded the Defendant remains unanſwered; and if it ſhall be taken that this Word [*Placitum*] goes to the laſt Plea only, becauſe the pleading of the Concord is only the Matter doubtful in Law, the other Two Pleas being only iſſuable, againſt which it's not to be preſumed, that the Plaintiff would tender a Demurer, then the Plaintiff not coming to Iſſue on the other Two Pleas, nothing is done as to them; ſo the Record is imperfect, and by Conſequence a Diſcontinuance of all the whole Matter. *Yel.* 65. *Middleton* and *Cheeſman*. Diſcontinuance.

Covenant againſt Aſſignee of Leſſee for Years, and Leſſee covenants to build an Houſe upon the Land within the firſt Ten Years, and that he aſſigned over his Term. Aſſignee pleads, the Leſſor enter'd, and had Poſſeſſion for Part of the Ninth Year. *Per Cur'*, He ought to ſhew that he would not ſuffer him to build, and then the Covenant had been diſcharged. *Godb.* 69. *Baker* and *Fetwell*. Entry of the Leſſor pleaded not good, to covenant to build an Houſe.

Warrantia Chartæ depending, is no Bar in Action of Covenant brought for Eviction;

Fraction

Fraction of Covenants, and *Warrentia Chartæ*, are of different Natures. *Yelv.* 139.

Scire facias of a Judgment: Defendant pleads, That before the Judgment and Hanging the Suit, the Plaintiff covenanted with him by the Deed now ſhewed, that if he obtained Judgment, and the Defendant on ſuch a Day paid him 100 *l.* that he would not ſue in Execution, and the Judgment ſhould be void; and pleads he had paid the 100 *l.* accordingly, and demanded Judgment. Plaintiff demurs, and it was adjudged to be no Plea; for he cannot make the Defeaſance of a Judgment before it be given, but his Remedy is only by Writ of Covenant upon the Indenture, *Cr. El.* 837. *Gage* and *Shurland*.

Where Remedy, not by Plea, but by Action of Covenant.

If a Man be bound to perform all the Covenants in an Indenture, if all are in the Affirmative, he may plead Performance of all generally, but if any be in the Negative, he ought to plead to them ſpecially, and to the reſt generally; ſo if any of them are in the Disjunctive, he may ſhew which of them he had perform'd, and if any are to be done on Record, he ought to ſhew it ſpecially. Doctor *Plot* 58. 1 *Inſt.* 303. *b.* *Vide Tit.* Covenants Conjunctive and Disjunctive, and Covenants Affirmative and Negative. *Vide Tit.* Bonds to perform Covenants, Pleading.

Of pleading affirmative Covenants, negative Covenants. Covenants in the Disjunctive.

I leaſe to *A.* for Years rendring Rent, *A.* deviſeth his Term to *B.* who aſſigns it to *C.* and I bring Action of Covenant againſt *C.* declaring that *B.* entered *virtute Legationis*, not ſaying that the Executor of *A.* aſſented to the Legacy: Yet this was adjudged good, a Verdict being againſt the Defendant, for it ſhall be intended after Verdict; but it had been bad if he had demurred to the Declaration. *Cr. Car.* 222.

On a Deviſe, Plea that he entered *virtute Legationis*, and ſaith not the Executor of *A.* aſſented to the Legacy.

De-

Declares, That the Plaintiff covenanted to go with a Ship to *D.* in *Ireland*, and to take 280 Men of the Defendant's, and bring them to *Jamaica*; and the Defendant covenanted to have the 280 Men there ready, and to pay for the Paſſage of them 5 *l.* a Man; and ſaith, the Defendant had not the 280 Men ready, but that he had 180, and he took them and carried them, and the Defendant had not paid for them. Defendant pleads he had the 280 Men ready, and tendered them to the Plaintiff, and that he would not receive them; but ſaith not any Thing to the Carriage of the 180 Men, nor to the Non-payment for them; and becauſe it was not a Plea to the whole, Judgment *pro Quer'*. 1 *Lev.* 16, 17. *Tompſon* and *Neel*.

Plea which anſwers but to Part only.

A latter Covenant by a ſecond Indenture cannot be pleaded in Bar to the former; but the Defendant muſt bring his Action on the laſt Indenture. 2 *Vent.* 218.

Debt on Bond to perform Covenants in a Leaſe: Defendant covenants that he would not deliver the Poſſeſſion to any but the Leſſor, or to ſuch Perſons that ſhould lawfully evict him. Defendant pleads, That he did not deliver the Poſſeſſion to any but ſuch who lawfully evicted him. Plaintiff demurs: It was objected that the Plea was a Negative Pregnant; he ought to have ſaid, Such a one lawfully evicted him, to whom he delivered the Poſſeſſion; or that he did not deliver the Poſſeſſion to any. But the Defendant ſaid, The Plaintiff had not aſſigned any Breach, and ſo cannot have Judgment; for he ought to have replied, and aſſigned a Breach. Againſt which it was ſaid, He having pleaded an ill Plea, had neceſſitated the Plaintiff to put himſelf upon the Judgment of the Court upon the

Negative Pregnant.

the Plea, *Yelv.* 78, 152, 153. *Per Cur'*, The Plea is good, purſuant to the Words of the Covenant being in the Negative; and that the Plaintiff ought to have replied, and aſſigned a Breach, which he having not done, cannot have Judgment. 1 *Lev.* 83. *Pullen* and *Nichols.*

Plea good, purſuant to the Words of the Covenant, and the Plaintiff in his Replication to aſſign a Breach.

Covenant upon a Conveyance of Lands, where the Vendor covenants, that he was ſeiſed in Fee; and aſſigns for Breach, that he was not ſeized in Fee, and ſo *non tenuit conventionem ſuam.* Defendant pleads, *non infregit conventionem ſuam*; and upon Iſſue joined, Verdict *pro Quer'.* It was moved in Arreſt of Judgment, that this was not any Iſſue, conſiſting of Two Negatives only; *ſcilt'*, that he was not ſeiſed in Fee, and *non tenuit conventionem* of the Plaintiff's Part, and *non infregit conventionem* of the Defendant's Part. *Per Cur'*, It is an Iſſue, though but argumentative and informal; for if he had not broken his Covenant, he was ſeiſed in Fee; and if he was not ſeiſed in Fee, he had broken his Covenant, and it is not all immaterial; and informal Iſſues are cured by Verdict, though immaterial Iſſues are not. *Pit* and *Ruſſell*'s Cale. Covenant and Breach aſſigned in not repairing of Houſes, and ſeveral other Things. The Defendant pleaded, *Non infregit conventionem.* Plaintiff demurs, The Plea was ill, becauſe no good Iſſue may be taken upon Two Negatives; alſo this Way of Pleading is too general, 1 *Lev.* 183. *Walſingham* and *Comb.*

Iſſue on Two Negatives.

Iſſue argumentative and informal.

Informal Iſſues cured after Verdict, immaterial not.

Action of Covenant is brought for Two Breaches; as to one a good Bar is pleaded, the Plaintiff ſhall not have Judgment. *Palm.* 110.

If *A.* covenant with *B.* to pay to him 10 *l.* after *Michaelmas*, and before *Eaſter*, in Debt upon this Covenant; if the Defendant pleads, that within the ſaid Time he tendered to the Plaintiff

Tender pleaded without ſaying, *Uncore priſt.*

Plaintiff the ſaid 10 *l.* and he refuſed it, yet this is not good without ſaying *Uncore priſt.* 2 *Rolls Abr.* 523. *Newton*'s Caſe.

In Action of Covenant, that it ſhould be lawful for the Plaintiff to have and enjoy for the Term of Nine Years; and that he might enjoy from 1664, which was Two Years before the Sealing and Delivery of the Deed. *Dyer* 240. Defendant pleads, The Plaintiff was not diſturbed *ab & poſt* the ſealing of the Deed. Plaintiff demurs. Becauſe no anſwer is made to the Time paſt, Judgment *pro Quer'*. 2 *Keb.* 291. *Lewis* and *Gellion.*

Quiet Enjoyment before the Time of ſealing the Deed.

Action of Covenant to pay Money, 30 *l.* when it ſhould be raiſed out of the Eſtate of *Anne D.* Plaintiff ſets forth, that 100 *l.* was raiſed out of the Eſtate of *Anne D* and that yet he had not paid the 30 *l.* Defendant pleads *Non infregit conventionem.* Plaintiff demurs. *Per Cur'*, This no Anſwer, nor a good Plea, but the raiſing the 100 *l.* muſt be anſwered; after Verdict it had been good enough. Judgment *pro Quer'*. 2 *Keb.* 342. *Brightwell* and *Dewty.*

In Covenant the Defendant pleads general Performance. It is no Plea: *Non damnific'* ſhould have been pleaded, or how he had quietly enjoyed. 2 *Keb.* 77.

Covenant and declares, That the Leſſee for Forty Years demiſeth to the Defendant for Twenty Years, rendring 16 *l. per Ann.* Rent, and that the Defendant covenanted to pay it; and that after he in the Reverſion of Forty Years aſſigns his Term to the Plaintiff, to whom the Defendant attorns, and aſſigns a Breach in Nonpayment of 16 *l.* for the Rent of one Year due at *Lady-Day*, 24 *Car.* 2. Defendant pleads, That before any Rent became due,

Leſſor grants the Reverſion, and after releaſeth Covenants to Leſſee before Breach.

the Leſſor releaſed to him all Covenants. Plaintiff demurs. Term *Mich. Jones* and *Rainsford*, being only in Court, this Releaſe was good to bar the Action, being before any Breach: But Term *Paſch.* being moved again, and the Court being full, Judgment was given for the Plaintiff; for they will intend the Action brought upon the *Reddendum*, which is a Covenant in Law, and runs with the Reverſion at Common Law before the Statute *H.* 8. and paſſeth by the Grant of the Reverſion; ſo that the Leſſor may not releaſe it after Aſſignment. 2 *Lev.* 207. *Middlemore* and *Goodale's* Caſe is upon a Collateral Covenant. *Harper* and *Burgh's* Caſe.

Debito modo, where ill in Pleading.

Action of Covenant to ſave harmleſs from Suits and lawful Eviction. Defendant pleads Performance. Plaintiff replied, *J. S.* took out a Writ of *Hab' fac' poſſeſſionem* out of *B. R. debito modo Execut'*, and by Vertue thereof enter'd on the Poſſeſſion of the Plaintiff, and did expel and amove him. Defendant demurs. Judgment *pro* Defendant; for *debito modo* is ill, and not ſufficient without ſhewing Particulars. As in Debt for Rent, to ſay, that a *debito modo* demanded, is ill. 1 *Keb.* 379. *Nicholls* and *Pullen.*

Where a Covenant in the ſame Indenture may be pleaded in Bar for Rent. *Vid.* 3 *Keb.* 331. *Et ſupra Tit.* Breach.

CHAP.

CHAP. XLIII.

Pleading. Eſtoppel.

BAron and Feme make a Leaſe for Years by Indenture, rendring Rent; and it is covenanted between the Parties; and the Leſſee covenants, That he will pay a Couple of Capons at *Chriſtmas* to Baron and Feme, and to the Heirs of the Husband, and alſo will ſerve them for two Days in every Harveſt. The Husband dies, the Wife brought Action of Covenant. The Defendant cannot plead, that the Wife at the Time of the Leaſe had nothing, but ſhall be eſtopped by the Indenture. 1 *Roll. Abr.* 872. *Bruerton* and *Evans.*

If one leaſe to me by Indenture the Land of *J. S.* who is then ſeiſed alſo of the Land; and after I enter upon *J. S.* who re-enters, upon which I bring a Writ of Covenant: Leſſor cannot ſay I was not in the Land by his Demiſe, for he is eſtopped. 1 *Roll. Abr.* 874. *Styles* and *Herring. Cro. Jac.* 73.

Debt on Bond to perform all Covenants contained in ſuch an Indenture: In Debt upon this Bond, the Defendant may not ſay, there is not any ſuch Indenture, but he is eſtopped.

In Debt on Bond, wherein the Condition is to perform all Agreements now ſet down by *J. S.* The Defendant may ſay no Agreement was then ſet down by *J. S.* for this comprehends a Generalty. *P.* 15 *Jac. King & Perſevall.*

A Demiſe for ſix Years, if *J. S.* ſo long ſhall live: Leſſor covenants, That he hath Power to demiſe

demiſe the Tenements according to the Effect of the Leaſe, and Breach aſſigned that he had not Power to aſſign.

1. He need not to aver that *J. S.* is alive.

2. The Plaintiff need not ſhew what Perſon hath Intereſt or Eſtate in the Lands, and it's more proper for the Defendant to ſhew it. *Brownl.*

Action of Covenant for not repairing an Houſe. Defendant pleads Performance, and after rejoins, he was ouſted by a Stranger. *Per Cur'*, It's a Departure. 1 *Keb.* 662. *Paine* and *Foſter.*

Departure.

Plaintiff declared, That he held the Office of Vice-Chamberlain to the Queen Dowager, and that by Deed produced in Court, he agreed with the Defendant for the Sale of the ſaid Office; but by the ſaid Writing, the Defendant obliged himſelf that the Plaintiff ſhould have and receive, during the Life of the Plaintiff, divers Penſions and Salaries belonging to the ſaid Office, and that the Defendant ſhould receive no Part of them: And then ſets forth, That the Defendant at his Procurement, was admitted into the ſaid Office, and enjoyed it; and that there were ſix Years in Arrears of a certain Salary belonging to the ſaid Office, due and payable to the Plaintiff according to the Agreement, which the Plaintiff had not received, nor the Defendant paid him: *Licet ſæpius requiſitus*, and ſo he broke the Covenant. Defendant pleads, That he from the Time of the Agreement, to the Time of the Writ, had permitted the Plaintiff to receive the Profits of the ſaid Office accordingly, *abſque hoc*, that the Defendant received any Profits of the ſaid Office. Plaintiff demurs, becauſe

cauſe the Defendant traverſed Matter not alledged; and *per Cur'*, the Travers was not good: and upon this Agreement the Defendant was not bound to pay the Money grown due for the Profits of the Office, to the Plaintiff; but was only reſtrained from meddling with them, and to leave them to be received by the Plaintiff. 2 *Vent.* 79. *Killegrew* and *Sawyer.*

In Debt on Bond to perform Covenants in Indenture of Leaſe. Defendant pleads, That before the Original purchaſed, the Indenture by Aſſent of the Plaintiff and Defendant, cancelled and avoided, and demands Judgment, *Si actio.* *Per Coke*, clearly the Plea is not good, without Averment that no Covenant was broken before the cancelling. 2 *Brownl.* 167.

In Covenant for not Repairing, and Breach ſhewed, that the Houſe was burnt down thro' the Negligence of the Defendant, *&c.* and that he did not repair it. The Defendant traverſed, That it was not burnt down, *prout.* It's an ill Traverſe; for the Defendant's not repairing, is the ſubſtantial Part, and the other is but Inducement. 24 *Car. B. R. Allen* and *Reeve.*

Covenant to pay Money on Articles. Defendant pleads Payment after the Day, of 5 *l.* in Satisfaction of 50 *l.* This is ill Plea; but it may be pleaded in Satisfaction of a Breach of Covenants. 1 *Keb.* 245.

In Action of Covenant the Defendant cannot plead, that the Plaintiff *tempore quo nihil habuit in Tenementis*, tho' ſuch a Plea in Action of Debt for Rent is good, it cannot be pleaded in Covenant for a Sum in groſs. 2 *Vent.* 99. *Clark* and *Peppis.* *Nil habuit in Tenementis.*

Later Covenant by a ſecond Indenture cannot be pleaded in Bar to the former; but the Defendant muſt bring his Action on the laſt In-

denture, if he will help himſelf. 2 *Vent.* 217, 218.

Monſtr. des faits.

Debt on Bond to perform Articles. Defendance pleads Performance. Plaintiff alledgeth Non-payment to *J. S. ſecundum formam Articulorum.* Defendant demurs, becauſe the Payment is not alledged to be any Article in the Indenture. *Per Cur'*, The Bar is ill by Performance, not ſetting forth the Indenture, and the general Replication is good enough without ſetting forth the Indenture; and the Defendant might have taken Iſſue in his Rejoinder, That there was no ſuch Article; and then the Plaintiff on Demurrer could have no Judgment: But by alledging a Breach he hath waved the ill Bar, that did not ſet forth the Indenture. 3 *Keb. Lee* and *Pigſly.*

Covenant to render an Account of the Profits of the Lands, what he expended in Reparations being deducted. He pleads, he expended 800 *l. in & circa reparationem Præmiſſorum, & alia onera neceſſaria*; and ſhews not what in particular. *Ergo*, It is ill. 1 *Sand.* 48. *Parker* and *Thorould.*

CHAP.

CHAP. XLIV.

What Releaſes ſhall be a good Bar of Covenants, or not.

COvenant from one, and his Heirs and Aſſigns, for further Aſſurance with *J. S.* *J. S.* conveys theſe Lands to *J. D.* *J. D.* as Aſſignee, brings an Action for not levying a Fine upon the Plaintiff's Requeſt. Defendant pleads a Releaſe from *J. S.* dated after the Commencement of the Suit. *Per Cur'*, The Breach being in the Time of the Aſſignee, and the Action brought by him, and ſo attached in his Perſon, the Covenantee cannot releaſe this Action, wherein the Aſſignee is intereſted; and alſo tho' the Breach was in the Time of the Aſſignee, yet if the Releaſe had been by the Covenantee before any Breach, or before any Suit commenced, it had barred the Aſſignee from bringing this Action. *Cro. Car.* 503. *Midlemore* and *Goodale*, 1 *Roll. Abr.* 411.

Covenantee not to releaſe after Aſſignment, and Action brought.

Condition for Performance of Covenants: Tho' the Covenants broken be releaſed, yet the Bonds remain under Forfeiture, *Hob. p.* 168. If before the Breach of any of the Covenants, the Obligee releaſeth the Covenants, and afterwards one of the Covenants is broken, the Obligation is not forfeited; for there is not now any Covenant which may be broken, and ſo the Obligation diſcharged; but if the Releaſe had been made after the Covenant broken, *aliter.* 3 *Leon.* 69.

Tho' Covenants broken be releaſed, yet the Bond remains under Forfeiture.

Obligee releaſeth Covenants before Breach: After Breach.

The Plaintiff aſſigned a Breach in *Non reparando.* The Defendant pleads, The Plaintiff had acquitted and diſcharged him of all Reparations. Plaintiff demurs. *Per Cur'*, This is an Acquittance and Diſcharge of the Reparations for the Time paſt as well as the Time to come, and amounts to as much as if he had releaſed that Covenant; but the Covenant being broken, that Diſcharge ſhall not take away the Action on the Obligation which was once forfeited. 3 *Leon.* 69.

Future Covenant, not releaſed by the Marriage of the Covenantor and Covenantee.

Covenant was, That if *B.* will be his Wife, and marry him, if *B.* ſurvive him he will give to her 300 *l.* *B.* alledges, They were married, and that *A.* died worth ſo much after his Debts and Legacies paid, and *A.* enters into a Bond to a third Perſon to pay it. It is apparent that this Debt is not due during the Coverture, but ought to be paid after his Death to the Wife: And *Windham* produced a Record of *Thompſon* and *Clarke*'s Caſe, which was adjudged in this Court, as appears by the Roll, *Hill.* 17 *Jac. Rot.* 1155. The Caſe was briefly this: A Man promiſeth, That in Conſideration ſuch a Woman would marry him, to leave to her 500 *l.* They are married, and the Husband dies; and after the Wife makes her Executors, and dies: Executors of the Wife bring Debt againſt the Adminiſtrators of the Husband, alledging he died worth ſo much, his Debts and Legacies being paid. Defendants demur, and Judgment was *pro Quer'*, That they ſhall recover the Debt. Which is a ſtronger Caſe than the prinpal Caſe; for here was an Obligation to a third Perſon, but here the Debt was founded upon the Contract. *Glinn* C. J. Covenant * before the Breach of it, may be releaſed by the Name of Covenant. The Court would not adjudge this Debt

* Covenant before the Breach of it, may be releaſed by the Name of Covenant.

Debt gone, 2 *Sid.* 59. The Caſe of *Smith* and *Stafford* was cited on the other ſide, *Hob.* 216. which was, the Teſtator promiſed if *A.* would marry him, and he died before her, to leave her worth 100*l.* and then ſays, that ſhe married him. Verdict *pro Quer'*. It was moved in Arreſt of Judgment, That the Promiſe was releaſed by the Marriage in Law. Againſt which it was objected, That this Action could not riſe during the Coverture, for it was not to be performed till after the Death of him that made the Promiſe: But however, it is a Promiſe preſently, and the Lieu or binding of the Promiſe is already in force, and he might have releaſed it before Marriage by the Word *Promiſe*, but not by the Word *Action*; and what might be releaſed actually, the Matriage releaſeth, and of that Opinion was *Hobart*: But it was adjudged the Promiſe was not releaſed. Vid. *Het. f.* 12.

When and by what Words a Covenant ſhall be releaſed. Vid. 2 *Mod.* 281.

If *A.* covenants with *B.* That *C.* ſhall pay 10*l.* yearly to *D.* *D.* may not releaſe this to *C.* in diſcharge of the Covenant, for that he is a Stranger to the Covenant; for when a Man binds himſelf that a Thing ſhall be performed to a Stranger, he hath taken it upon him that the Stranger ſhall accept it. 2 *Roll. Abr.* 402. *Quick* and *Ludborough*. Covenant to do a Thing to a Stranger.

This Caſe is reported in 3 *Bulſt.* The Covenant was, That a Stranger ſhould pay 8*l.* yearly to one of the Covenantees, and to one *Frances Joyner* a Stranger. *Frances Joyner* took to Huſband one *Bucks*, who releaſed this Payment. *Per Cur'*, It is no good Releaſe: It is neither a Debt

or Duty in the Party to whom the ſame is to be paid by the Covenant, and a Releaſe doth not operate but upon an Eſtate, Intereſt or Right, none of which is here: In this Caſe a Diverſity was taken between where a Man is Party to a Covenant or Condition, and where he is a Stranger: If he be a Party to whom the Performance is to be made, and he refuſeth, it is a good Plea to plead the Refuſal. *Aliter* where the ſame is to be done to a Stranger who refuſeth, for it was his Folly to bind himſelf to do a Thing which he cannot effect. 3 *Bulſt.*

A Releaſe of all Demands is no Bar in an Action of Covenant afterwards broken. *Cro. Jac.* 487, 170. *Field* and *Hancock.*

By Releaſe of of all Actions.

J. N. doth covenant with *J. S.* by Indenture, to pay him 40 *l.* yearly for 21 Years, and after *J. S.* doth releaſe to *J. N.* all Actions; the whole Covenant is not diſcharged, only the Arrears; becauſe the Covenant is executory, yearly to be executed during the Term of 21 Years, for he may have ſeveral Actions of Covenant for every Time it is behind; for nothing ſhall be diſcharged by the Releaſe of all Actions, but that which was in Action, or a Duty at the Time of the Releaſe made. *Rhodes* Serjeant, put a Caſe which he vouched to be adjudged, 4 *Eliz.* If a Man covenant with *J. S.* That if he will marry his Daughter, that then he will pay him 20 *l.* if a Releaſe were made by *J. S.* before the Marriage, the ſame will not determine the 20 *l.* if he marry her afterwards, becauſe it was not a Duty before the Marriage. *Godb. p.* 12, 2 *Cro.* 171.

What

What ſhall be ſaid a good Releaſe of Covenants, or not.

The Teſtator of *S.* covenants with the Plaintiff, Not to intermeddle, ſue or moleſt the Plaintiff, or demand any Account of *G.* Father of *Mary* Wife of the Teſtator *Sterling*, who had deviſed all his Perſonal Eſtate to the Plaintiff in Truſt for the Uſe of the Wife; and aſſigns for Breach, That *Sterling* in his Life-time, in the Name of him and the ſaid *Mary* his Wife, had ſued the Plaintiff in the *Exchequer*-Chamber by *Engliſh* Bill, touching the ſaid Perſonal Eſtate, and had cauſed him to expend 300 *l.* Defendant pleads a Releaſe made after the Death of *Sterling* to himſelf, by himſelf and the ſaid *G.* and the ſaid *Mary*, then his Wife, of all their Right, Title and Demand in all the Brewing-Veſſels, and all the Perſonal Eſtate of the ſaid *Sterling*, according to the Cuſtom of *London*, or otherwiſe. Plaintiff demurs generally: And *per Cur'*, This Releaſe ſhall not bar the Action of the Plaintiff; for this extends only to Goods *in Specie*, claimable by the Plaintiff, and other the Releaſors, and not to the whole Covenant of *S.* and this was the apparent Intent of the Parties. Releaſe where it extends not to the whole Covenant.

Sir *Tho. Jones* 104. *Morris* againſt *Wilford*, Exetor of *Sterling*; but this Caſe is more fully reported in *Levinz.*

Morris brought an Action of Covenant againſt *W.* Executor of *S.* declaring, That *S.* by Deed covenanted with *M.* the Plaintiff, not to ſue or moleſt *M.* touching the Eſtate of *G.* Father of the Wife of *S.* who had deviſed all his Perſonal Eſtate to *M.* the Plaintiff, in Truſt for the Wife of *S.* and aſſigned the Breach, That after ſuch

Covenant, *S.* in his Life time, in the Names of him and his ſaid Wife, ſued *M.* now Plaintiff, in the *Exchequer* by *Engliſh* Bill, touching that Perſonal Eſtate, and cauſed *M.* to expend in that Suit 300 *l.* The Defendant pleaded, That after the Death of *S.* (the Defendant's Teſtator) *M.* now Plaintiff, and *Mary* late Wife of *S.* and Daughter of *G.* by their Deed releaſed to the now Defendant, all their Right, Title and Demand in the Brewhouſe, releaſed to the Defendant, *totum eorum jus titulum, clameans & demand' al'* Brewhouſe of *S.* and to all the Brewing-Veſſels, and all their Claim and Demand to the Perſonal Eſtate of *S. virtute conſuetud' Civitatis* London' *vel alit' quocunq; modo.* Plaintiff demurs. *Per Cur'*, This Releaſe is not any Bar in this Caſe by the general Words; and being made to particular Purpoſes, the particular Purpoſes ſhall guide the general Words, and extends not to foreign Matter, (*videlicet*) Damages to be recovered for Breach of Covenant with the Plaintiff, altho' he be Executor of *S.* 2. Releaſe of all Demands to the Perſonal Eſtate of *S.* will not bar *M.* the Plaintiff, becauſe at the Time of the Releaſe he had no Right to demand any Part of the Perſonal Eſtate, but only to have Action againſt the Perſon. 2 *Levinz* 214. *Morris* and *Wilford.*

Covenant not to ſue before ſuch a Day, no Suſpenſion of the Debt, nor a Releaſe.

If the Obligee covenant with the Obligor, who is bound to perform Covenants not to moleſt or ſue him before ſuch a Day; This is not any Suſpenſion of the Debt; for the proper Senſe of the Words is, to have Covenant upon it if he ſue before the Day, and not to make it a Releaſe. 1 *Roll. Abr.* 939. *Dowſe* and *Jeffreys*, *Jones* 104.

Articles

Articles were made between Commoners, how many Beaſts each were to put in, and the Plaintiff and Defendant were two. Covenant brought againſt the Defendant for putting in more Beaſts. Defendant pleads a general Releaſe, and amongſt other Things of Obligations, *& obligatoria ſcripta*. Now tho' the Word *Obligatoria* extend *ex vi termini*, to any Writings under Seal: But *per Cur'*, this Releaſe extends not to diſcharge the Covenant. *Ray.* 392. *Cartlidge.*

Releaſe of *Obligatoria ſcripta*, to what it extends.

Covenant to three, who had bought an Advowſon, That it is free from Incumbrances. One releaſeth to the other two: *Quer'*, If they two can bring Action of Covenant without naming the third Perſon that releaſed? *Per Rolls*, They may, for after this Releaſe it is as a Bargain and Sale to them two only; and in Action brought againſt them two, they may plead a Feoffment made to them two only, without naming the third, who releaſed. *Marſh* 176. *Hayward's* Caſe, 6 *Rep.* 79.

In mutual Promiſes, the Plaintiff agrees to releaſe his Equity of Redemption in two Cloſes: In Conſideration whereof, the Defendant aſſumes to pay 7 *l.* to the Plaintiff. He releaſeth the Equity of Redemption by Deed, and at the End of the Deed makes a general Releaſe upon Action brought for the 7 *l.* Defendant pleads this Releaſe. *Per Cur'*, The Releaſe ſhall not be a Diſcharge of the Duty, which was created by it: So *Potter* and *Philips*, *Pal.* 218. 2 *Cro.* 627. The Defendant in Conſideration that the Plaintiff would allow to the Defendant 7 *l.* Rent due to him upon Demiſe, and would make a Letter of Attorney to him to ſue a Bond made to the Plaintiff, and that he will releaſe to the Defendant

Releaſe not to diſcharge a Duty created by it.

dant all Actions and Demands; the Defendant promiſed to the Plaintiff, That if he did not receive the ſaid Debt, that he would pay it to the Plaintiff, and then he avers Performance particularly of his Part. After Verdict *pro Quer'*, it was moved in Arreſt of Judgment, that by the Releaſe the Promiſe was diſcharged. *Curia contra*, Becauſe the Releaſe is Part of the Conſideration which induced the Promiſe; and alſo, the Promiſe is to do a future Act, which may not be releaſed by a Releaſe of all Actions and Demands. *Lut.* 249.

Covenant not to ſue an Obligation before *Michaelmas*: This is no Releaſe, nor to be pleaded in Bar; but only a Covenant, and the Party put to his Covenant if he be ſued in the *interim*, as was adjudged in *Deux* and *Jeffrey's* Caſe, *Mich.* 36 & 37 *El. B. C.* for it was not the Intent of the Parties to make this a Releaſe, 21 *H.* 7. 27. but a Covenant not to ſue me *omnino*, peradventure goes to a Releaſe, and may be pleaded in Bar as the Judges ſaid in the Caſe aforeſaid.

CHAP.

CHAP. XLV.

Where to be tried.

BOnd for Performance of Covenants in an Indenture. The Plaintiff aſſigned the Breach, That the Defendant himſelf by the ſame Indenture covenanted, That the ſaid Houſe was diſcharged of all former Eſtates and Incumbrances: And further ſhewed, That the Defendant had made a former Leaſe of the ſaid Houſe to *A. B.* in the County of *Warwick*. To which the Defendant ſaid, That, *tempore dimiſſionis*, he was within Age; and upon Iſſue, it was tried in the County of *Warwick*, and good, and need not be tried where the Writ was brought. 4 *Leon.* 167.

Tried at the Place where the Incumbrance was made.

In Action of Covenant the Caſe was, That the Plaintiff was the Apprentice of the Defendant, and the Defendant had covenanted to inſtruct him in ſuch a Myſtery. Which Covenant was in *Middleſex*, and for not inſtructing him brought his Action there. Defendant pleads Departure in *London* out of his Service. Plaintiff demurs. It was prayed, That the Action might not be removed into *London*, notwithſtanding the Breach laid there. The Jurors are bound to find this Matter, tho' in a foreign County. 6 *Rep.* 47. *Per Cur'*, The Action ſhall not be removed. In this Caſe ye ought to take a Writ of Enquiry to tax Damages in *Middleſex*. 2 *Sid.* 60, 118. *Dixon* and *Williams*. 1 *Keb.* 816. cited *Vide*.

A tranſitory Action.

In

Foreign County.

In Action of Covenant in *London* on Bottomree: The Defendant pleads, the Ship was caſt away at *Falmouth*, in a Foreign County: To which the Plaintiff demurred, it being a tranſitory Action and Plea, as *Dixon* and *Williams*'s Caſe *ſupra*, where the Defendant ſwore his Plea of the Departure into *London*, and Judgment for the Plaintiff there affirmed in a Writ of Error. *Coleman pro* Defendant, by Traverſe of the ſame Matter in the Declaration, cannot alter the Place: *Contra*, if it be new Matter; which accords with the Count, and ariſeth from the Covenant it ſelf. *Sed Curia contra*, and *Dixon*'s Caſe is unanſwerable: The old Books are as *Coleman* cited, 1 *Keb.* 816. *Collins* and *Sanders*.

Covenant was brought againſt the Mayor, Burgeſſes and Corporation of *Berwick*, upon a Leaſe. The Defendants demiſed to the Plaintiff an Houſe in *Berwick*, with a Covenant, That the Plaintiff ſhould enjoy without Interruption, *&c.* and one *J. S.* a Stranger, entered upon him. The Defendants plead a Local Plea, (*viz.*) That the ſaid *J. S.* did not enter upon the Premiſſes, and a *Venue* to the next County. This Iſſue ought to be tried where the Action is laid. *Vid. Dowdale*'s Caſe. If Action be brought upon a Matter done out of the Kingdom, it is to be tried where the Action is laid, and *Berwick* is out of the Kingdom. *Vid.* 12 *Eliz. Roll.* 650. and *Roll.* 97. 1 *Mod.* 37. *Cuſp*'s Caſe.

Tryal,

Tryal. Iſſue. Verdict.

In Action of Covenant, if the Plaintiff count, That upon a Bargain for certain Lands between the Plaintiff and Defendant, the Defendant covenants, That if there were not ſo many Acres upon the Meaſure as the Defendant had ſaid to the Plaintiff upon the Sale when the Land was ſold, that he would repay for every Acre that ſhould be wanting of the Number 11 *l.* and alledgeth, That upon the Meaſure ſo many Acres in certain were wanting, which amounts, according to 11 *l.* the Acre, to 700 *l.* and the Iſſue was, whether they were wanting, *&c.* And the Jury found for the Plaintiff, and gave 400 *l.* Damages. This Iſſue is well found for the Plaintiff; for altho' it be found that by this ſo many Acres are wanting, yet they are Chancellors, and may give ſo much Damages as the Caſe requires in Equity, in as much as all is to be given in Damages. 2 *Roll. Abr.* 703. Sir *Baptiſt Hicks* and *Goates*.

Where the Jury are Chancellors, and may give ſo much Damages as the Caſe requires in Equity.

Note, That the *Venue* is not changeable in Covenant.

Venue not changeable in Covenant.

Covenant againſt an Apprentice upon his Indenture, for ſpeaking Words, *ad damnum Magiſtri*. Defendant moved to change the *Venue*, for the Matter of the Action is Words; for which, Action on the Caſe ſhould be brought, and this Action is brought only for the Plaintiff to elect his County for the Trial, and to ouſt the Defendant of the Privilege to change the *Venue*: But the Court would not change it. 1 *Levinz* 307. *Taylor* and *Berkett*.

Action

Action of Covenant is laid in *London*, and Iſſue is upon a Feoffment of Lands in *Oxfordſhire*. It was tried at *London*, where the Action was laid; and Feoffment of Lands in *Oxon* is local, and ought to be tried there: But by *Vaughan*, *& tot' Cur.* it is cured by the Statute *Feofailes*, 17 *Car.* 2. by the expreſs Words of it, being tried in the County where the Action was brought, *Vide* 2 *Lev.* 165. *Adderly* and *Wiſe*.

Where Trial ſhould be local, and is not laid ſo, it's cured by Statute 17 *Car.* 2.

A Man brought Covenant in *Southampton*, and declares upon a Covenant made there: The Defendant pleads a Releaſe in *Suſſex*. *Replic'*, That he that made the Releaſe was an *Ideot*, upon which the Iſſue is. This ſhall be tried where the Releaſe is pleaded, and not where the Action is brought, *Dier* 112.

Covenant in *Southampton*, Releaſe pleaded in *Suſſex*. *Replic'* it was made by Ideot.

In Covenant on a Bill of Sale, That the Defendant was legal Proprietor of Wooll ſold, and had Power. Plaintiff alledgeth a Breach, that he was not Proprietor, *Et ſic infregit conventionem*, and ſaith not, *Et ſic non tenuit conventionem*. Defendant pleads, *Tenuit convent'*. Plaintiff demurs. *Per Cur'*, The Breach is ſufficient, and the *Sic infregit* is but Form. 3 *Keb.* 396. *Streeting* and *Hind*.

Sic infregit.

Sic non tenuit conventionem.

Convenant upon a Conveyance of Lands; where the Vendor covenants, that he was ſeiſed in Fee; and aſſigns for Breach, that he was not ſeiſed in Fee, *Et ſic non tenuit conventionem ſuam*. Defendant pleads, *Non infregit conventionem ſuam*; and upon Iſſue joined, Verdict *pro Quer'*. It was moved in Arreſt of Judgment, that this was not any Iſſue, conſiſting of Two Negatives only; *ſcilt'*, That he was not ſeiſed in Fee, *& non tenuit conventionem* of the Plaintiff's Part, *& non infregit conventionem* of the Defendant's Part. *Per Cur'*, It is an Iſſue, tho' but argumentative and informal; for if he had not

Iſſue on Two Negatives.

Iſſue argumentative and informal.

not broken his Covenant, he was ſeiſed in Fee; and if he was not ſeiſed in Fee, he had broke his Covenant, and it is not all immaterial. Informal Iſſues are cured by Verdict, though immaterial Iſſues are not. *Pit* and *Ruſſel*'s Caſe. Covenant and Breach aſſigned in not repairing of Houſes, and ſeveral other Things. The Defendant pleaded, *Non infregit conventionem.* Plaintiff demurs. The Plea was ill, becauſe no good Iſſue can be taken upon Two Negatives; alſo this Way of Pleading is too general. 1 *Lev.* 183. *Walſingham* and *Comb. Sid.* 289. 2 *Keb.* 18. 13. 47.

Informal Iſſues cured after Verdict, immaterial not.

L. brought Action of Covenant againſt *B.* and declares, That the Defendant being poſſeſſed of an Advowſon in Groſs for Term of Years, covenanted that he would not grant nor aſſign his Intereſt to any without Offer thereof to the Plaintiff; and aſſigns for Breach, that he granted the ſaid Advowſon and his Term therein over, without offering it to the Plaintiff: And Iſſue joined on *non conceſſit*, and found by Verdict *quod conceſſit*, and Damages 50 *l.* It was moved in Arreſt of Judgment, that it is not alledged that the Grant on which the Iſſue is joined was by Deed, and then no Breach is aſſigned. But that was averred by the Verdict, and it ſhall be intended upon the Evidence, that a Deed was ſhewed, as upon Iſſue joined on a Grant of a Reverſion, where it was not alledged it was by Deed, or that the Tenant attorned; yet if it be found, it ſhall be good. *Hutt* 54. *Lightfoot* and *Brightman.*

Breach, that he granted the Advowſon, and ſaith not by Deed, it may be averred by the Verdict, and intended upon the Evidence, that a Deed was ſhewed.

Iſſue. Trial.

Several Pleas for every ſeveral Point; he ſhall put himſelf upon the Country, in what Caſe.

Covenant: The Plaintiff let to the Defendant certain Tythes, and the Defendant render'd Rent, and enter'd into Bond for Security. The Defendant for Part, pleaded Payment; and for other Part, Tender, without *Uncore priſt*; and for the other Part, that he is ready to make the Obligation. This is not ſufficient, but he muſt do it at his Peril, and Judgment *pro Quer'*. Alſo for every ſeveral Point he ſhould have put himſelf upon the Country, becauſe the Plaintiff had alledged *non ſolvit*; but otherwiſe, Iſſue ſhould be taken by the Plaintiff. 1 *Keb.* 54. *Banbury* and *Newland.*

Covenant founded upon a Writing made in *London.*

Covenant in *London* for not repairing of Hedges, and for not ploughing the Land in the County of *Hertford*; and upon a *nil dicit*, a Writ was awarded to the Sheriff of *London* to enquire of Damages. Damage was found, and the Writ returned. It was moved, that the Writ iſſued erroneouſly, becauſe it was not directed to the Sheriff of *Hertford*, where the Land lay, and where the Damages were properly enquirable, *Sed non alloc'*, becauſe the Covenant is founded upon a *Writing* made in *London. Cro. Jac.* 142. *Smith* and *Batten.*

Sir *T. G.* covenanted with *C.* that where he is poſſeſſed of a Leaſe of Twenty one Years of certain Lands, that he will aſſure, convey, and aſſign the ſaid Leaſe to *N.* Bond for Performance. In Debt againſt Sir *T. G.* he pleaded the Conditions, and the Performance of them. The Plaintiff *replicando* ſaid, That the Defendant *non aſſuravit, conveyavit, & tranſpoſuit*, (*Anglice*, ſet over) the ſaid Leaſe, upon which they were at Iſſue. At the Day of *Niſi prius*, it

was moved, that the Iſſue was misjoined; for the Defendant pleads as the Covenant it ſelf is, that he had aſſured, conveyed, and aſſigned the Leaſe. The Plaintiff aſſigned the Breach in this, *Quod non aſſuravit, conveyavit, & tranſpoſuit*, [*Anglice*, ſet over:] Which Word [*Tranſpoſuit*] is not in the Covenant, nor in the Pleading of Performance thereof. *Note*, The Covenant was, *ut ſupra*. The Plaintiff aſſigned the Breach, *Quod non aſſuravit, conveyavit, & tranſpoſuit*, [*Anglice*, ſet over;] and the Defendant pleads, *Quod aſſuravit, conveyavit, & aſſignavit*, [*Anglice*, ſet over.] And the Court was clear of Opinion, That the Iſſue was not well joined. 2 *Leon.* 116. *Gray* and *Conſtable*.

The Breach is, *Quod non aſſuravit, conveyavit, & tranſpoſuit.*

Defendant pleads, *Quod aſſuravit, conveyavit, & aſſignavit*, Iſſue not well joined.

In Debt on Bond to perform Covenants, Not to take or treat for a new Leaſe without the Aſſent of the Plaintiff. Defendant pleads, He took no new Leaſe *contra formam Indentur'*. Plaintiff replies, He did take a new Leaſe, not ſaid, by or without the Aſſent of the Plaintiff. Defendant demurs. *Per Cur'*, The *Replicat'* is good enough; had the Covenant been to take no new Leaſe, and the Plaintiff had aſſigned a Breach, that he took a new Leaſe, not ſaying, [without the Aſſent of the Plaintiff,] it had been ill, and not aided by ſaying, *Contra formam Indentur'*: But here the Plaintiff is miſled by the Defendant, and the Iſſue is good enough. 3 *Keb.* 524. *Perry* and *Whitledge*.

Trial.

Covenant was brought for Non-payment of Rent on a Demiſe of *Allum* Mines. Defendant pleads, That the Plaintiff encloſed the Mines, ſo that the Defendant could not have Ingreſs to the Work. And this was tried in *London*, where the Covenant was alledged to be made. Defendant, after Verdict againſt him, moved in Arreſt of Judgment, that this was a Miſtrial; but it is aided *per Stat.* 16, 17 *Car.* 2. *c.* 8. *An Act to prevent Arreſt of Judgment. Q. T. Jones Eq.* 82. *Aynſworth* and *Chamberlain.*

Miſtrial aided by Statute 16 & 17 *Car.* 2. *c.* 8.

Covenant for not repairing, to be tried where the Houſe lie.

Covenant brought in the County of *B.* and Breach aſſigned in not repairing an Houſe in the County of *H.* This is a Miſtrial. *Sid.* 157. The Caſe was, Action of Covenant was brought in *Hampſhire*, and Breach aſſigned for not repairing of an Houſe in *Barkſhire*; and Iſſue was joined upon *Non infregit conventionem*, and Verdict in *Hampſhire* for the Plaintiff. And it was moved in Arreſt of Judgment, that this was a Miſtrial. And of this Opinion was all the Court, (except *Windham*) for they ſaid, That this was a ſpecial Iſſue, upon which nothing may be given in Evidence, but the not Repairing of the Houſe; and this is in *Barkſhire*. And though the Privity remains, this Action being brought by them, *&c.* which are Parties to the Deed, and not Aſſignees, yet it doth not give to the Plaintiff any Election in this Caſe, and ſo it was a Miſtrial. *Sid.* 157. *Gilbert* and *Martin.* 1 *Keb.* 525, 601. *Meſme* Caſe.

If

If Action be brought upon a Charterparty, and a Breach is assigned in a Foreign Kingdom, it shall be tried where the Charterparty is dated. 1 *Vent.* 58. *Crisp* and *Jackson* against the Mayor and Commonalty of *Berwick*. *Vide Raym.* 173.

A Breach is assigned in a Foreign Kingdom.

In Covenant against *Wise*, Defendant pleaded a Feoffment of Land in *Oxfordshire*, and the Issue was *non feoffavit*, and afterwards it was tried in *London*. *Per Cur'*, The Statute 17 *Car.* 2. *c.* 8. will help it. 1 *Vent.* 263. That Statute helps all Mistrials, so as the Trial be in the County where the Action is brought. *Jennings* and *Hunking*. *Vide Sid.* 157.

Statute 17 *Car.* 2. *c.* 8. Helps all Mistrials, so as the Trial be in County where the Action is brought.

Debt on Indenture, wherein were divers Covenants to be performed on the Part of the Defendant. Plaintiff alledgeth in his Count, Breach of all generally. Defendant pleads, he performed all. Plaintiff replies, and shews one in Specie. The Jury shall be only charged with this Covenant. *Dier* 297.

Damages.

If more be found in the Breach of the Covenant assigned, than was contained in the Conant it self, and so Damages given for more than ought, it is erroneous. *Stiles Rep.* 12. *Needler* and *Gueſt*.

Damages given for more than ought.

The Breach was assigned in Two Covenants; and it appeared that for one he had no Cause of Action, and for the other a good Cause; and Issue was joined upon both, and found for the Plaintiff in both, and Damages entirely assessed. The Plaintiff could not have Judgment. *Cro. El.* 685.

Breach assigned in Two Covenants, and for one he had no Cause of Action, and for the other a good Cause, and Damages entire.

Vid 2 *Roll. Rep.* 46.

Though in Treſpaſs one may be guilty, and the other not, yet in Covenant, Debt, or other Contract which is joint, one may not be convict without the other; and here by the Verdict for one, Defendant pleads, that the Covenant is performed: It appears, now that the Plaintiff has not any Cauſe of Action, and therefore ſhall not have Judgment, as *Tillies* and *Woodie's* Caſe. *Ed.* 4. And the Defendant ſhall have Coſts upon the Verdict againſt the Plaintiff, and no Coſts or Damages againſt the other.

From what Time ſhall the Grantee of Reverſion recover Damages.

A Man made a Leaſe for Years, and the Leſſee covenanted to make Reparations. Leſſor granted the Reverſion to another, and Leſſee for Years made his Wife Executor, and died. *Per Cur'*, The Grantee of the Reverſion ſhall not recover Damages, but from the Time of the Grant, and not for any Time before. 3 *Leon.* 51.

Damages, where to be recovered by the Executor, and not by the Heir or Aſſignee.

A Covenant with one, his Heirs, and Aſſigns, for Enjoyment, and this is touching an Eſtate of Inheritance. *Per Cur'*, The Eviction being of the Teſtator, he cannot have Heir or Aſſignee of this Land; but the Damages ſhall be recovered by the Executor, though not named in the Covenant, for they repreſent the Perſon of the Teſtator. 2 *Lev.* 26. *Lucy* and *Levington.*

In Action of Covenant, if the Plaintiff count, that upon a Bargain for certain Lands between the Plaintiff and Defendant, the Defendant covenants, That if there were not ſo many Acres upon the Meaſure as the Defendant had affirmed to the Plaintiff upon the Condition, that he would pay for every Acre that was wanting of the Number 11 *l.* and alledges, that upon the Meaſure ſo many Acres in

in certain were wanting, which amounted according to the 11 *l.* the Acre to 700 *l.* And the Iſſue is, Whether they were wanting? The Jury found for the Plaintiff, and gave 400 *l.* Damages. This Iſſue is well found *pro Quer'*. For although it be found by this, that all the Acres are wanting, yet they are Chancellors, and may give ſo much Damages as the Caſe requires in Equity, in as much as all is to be given in Damages. 2 *Rolls Abr.* 703. Sir *Baptiſt Hicks* and *Goats*.

Jury may give ſo much Damage as the Caſe requires in Equity.

The Jury gave leſs Damages than covenanted for. 1 *Rolls Rep.* 25, or 257.

Judgment.

Covenant brought againſt two, and Judgment by Default againſt one, and the Iſſue found for the other, the Plaintiff never ſhall have Judgment. The Caſe was; Covenant brought againſt two upon an Indenture, by which they covenant artificially to erect an Houſe, *&c.* The one makes Default, by which Judgment is againſt him; the other pleads, That they two had artificially erected the Houſe: Upon which they are at Iſſue, and found *pro Deft'*. And it was moved for the Plaintiff, notwithſtanding this Verdict, to have a Writ of Enquiry againſt that Defendant, againſt whom Judgment is given *per* Default; *quia*, here the Act to be done, ought to done by both, and one is condemned of Non-Feaſance by the Judgment. But it was held *per Cur'*, That no Writ of Enquiry ſhall iſſue, nor ſhall the other Defendant be charged with any Damages; for it appears by the Verdict, that

Covenant againſt Two, Judgment by Default againſt one, the other pleads Performance, and it is found *pro Deft'*. Plaintiff ſhall not have Judgment againſt the other.

the Covenant is performed, and the other Defendant ſhall have Coſts againſt the Plaintiff. *Sid.* 76. *Boulter* and *Ford*. And *Windham*, Juſtice, held in this Caſe, That if the Defendant had pleaded, that the Houſe was artificially erected, or that it was artificially erected by him (without ſaying, by them Two): And the Jury found it ſo accordingly, that this is a good Performance of the Covenant, becauſe the Thing required to be done, is accordingly performed. And therefore there is Difference between this Caſe, and the Caſe where two covenant to go to *York*; there one cannot plead that he went, but ought to plead, that they Two went to *York*, becauſe there is a perſonal Act to be done, and one cannot go to *York* by a Deputy, as he may erect an Houſe. *Sid. ibid.*

This Caſe Precedent is in 1 *Lev.* 63. by the Name of *Porter* and *Harris*.

Action of Covenant was brought againſt the Defendant, and the Breach of Covenant alledged to be in the Time of the Executor, and the Judgment was enter'd of the Goods of the Teſtator. The Breach was for ploughing of Land contrary to Covenant. 1 *Brownl.* 24. *Caſtilion* and *Smith*, Executor of *Smith*.

In Covenant, divers Breaches are aſſigned, and ſome are well, and ſome are ill; if the Defendant demur upon the entire Declaration, the Plaintiff ſhall have Judgment for the Breaches which are well aſſigned, and be barred for the Reſidue. 2 *Sand.* 379. in *Pinckner's* Caſe.

Rodly

Rodly and Cook. 1 *W. & M. B. R.*

Defendant brings Error upon a Judgment in *C. B.* in Action of Covenant, and affigns for Error, want of an Original. Upon which the Plaintiff has a *Certiorari*, and had an Original certified, which was that *teneant Conventionem*, whereas there was but one Defendant, which was held to be Error: But if want of an Original had not been affigned, the *Curſitor* might have mended the Original.

CHAP. XLVI.

What ſhall be ſaid a good Performance of a Covenant or not. Vide Tit. Intent.

Performance in Subſtance.

IF the Covenant be performed in Subſtance and Intent, it is good, tho' it differ in Words; as when one covenants to deliver the Teſtament of the Teſtator, if he plead he hath delivered *Literas Teſtamentarius*, it is good. 7 *Ed.* 43.

Covenant to give Licence to carry Trees, and a Stranger diſturbs him.

If a Covenant be to give Licence to the Covenantee to carry Trees, or other Thing which he had bought of him; yet if a Stranger, who hath Right, diſturb him, the Covenant is performed, for this extends but to the Perſon of the Covenantor. 18 *Ed.* 4. 20. *b. Aliter*, if the Covenant had been, that he ſhall have Licence, for this extends to all Strangers, *ibid.*

A Covenant, that he ſhall have Licence, and the Diverſity.

Covenant to withdraw a Suit; a Diſcontinuance is no Performance.

If a Covenant be to withdraw a Suit, a Diſcontinuance is no Performance, and it differs in Subſtance, for a *Retraxit* is a Bar, in another Action a Diſcontinuance not. 2 *Ed.* 4. 8.

Leſſor covenants with his Leſſee for Years, That it ſhall be lawful for the Leſſee peaceably to enjoy the Land; and afterwards the Leſſor enters tortiouſly upon the Leſſee, and ouſts him. This is a Breach, for the Intent was, that he ſhould enjoy it without the Interruption of the Leſſor. 1 *Rolls Abr.* 427. *Cone's* Caſe.

If

If Leſſee of an Houſe covenants not to leaſe the Shop, Yard, and other Things pertaining to the Houſe, to one who ſold Coals there, and after he lets all the Houſe to one who ſold Coals; he hath broken the Covenant, for the Intent ought to be performed, *id. ibid. Boner* and *Langley*. Intent.

The Plaintiff covenants to go with his Ship, with the firſt fair Wind, a Voyage to *Cales*. And the Defendant covenants, That if he ſo do, to pay him at his Return ſo much for Freight. The Plaintiff alledged, He had been there, and was returned, and the Defendant had not paid him. The Defendant pleaded a Plea, and traverſed, *abſq; hoc*, that the Plaintiff ſailed with the firſt fair Wind. *Per Cur'*, It is an ill Traverſe; for the Subſtance of the Covenant is to perform the Voyage, and the firſt fair Wind is no material Part of it. *Hard. p.* 69. *Conſtable* and *Clobery* cited. Subſtance of the Covenant not traverſed.

If the Condition or Covenant be to aſſure certain Lands to ſuch a Perſon as the Obligee or Covenantee ſhall name, and after he aſſures this to the Obligee himſelf; it is a good Performance, though it be not alledged that the Obligee named himſelf, for this Acceptance is a Nomination of himſelf. 1 *Rolls Abr.* 424. *Houſeye* and *Wild*. Covenant to aſſure Lands to ſuch Perſon as he ſhall name, and he names himſelf.

A Man by Deed indented, bargained and ſold Lands to another in Fee, and covenanted by the ſame Deed to make him a good and ſufficient Eſtate in the ſaid Lands before *Chriſtmas* next; and afterwards, before *Chriſtmas*, the Bargainor acknowledged the Deed, and the ſame is enrolled. *Per tot' Cur'*, By that Act the Covenant is not performed, for he ought to have levied a Fine, or to have made a Feoffment, *&c.* 3 *Leon. p.* 1. Where Deed of Bargain and Sale enrolled, is not a good Performance.

Cove-

Covenant to convey Land, it muſt be an effectual Conveyance ſo to ſurrender.

Covenant to convey Land, it muſt not only be an abſolute, but an effectual Conveyance. If a Man be bound to ſurrender a Copyhold to the Uſe of *A.* and his Heirs, on Conſideration of Money; if he ſurrender into the Tenants Hands, he muſt get it preſented, for it muſt be an effectual Surrender; as, if a Man be bound to make a Feoffment to me to be upon Requeſt, if I requeſt him to make a Deed of Feoffment with Letter of Attorney to *B.* to make Livery to me, and he doth ſo, this is a good Inception; yet if Livery be not made, it is a Forfeiture. 1 *Roll. Abr.* 425. *Shan* and *Belby*.

An Act covenanted to be done, and is done, tho' afterwards diſſolved or reverſed by Law-ſuit.

A Man covenants, That *T. H.* Son and Heir apparent of *J. H.* ſhall marry *E. L.* before the ſaid *T. H.* and *E. L.* ſhall attain their ſeveral Ages of Fourteen Years, if *E. L.* would conſent thereunto. Afterwards *T. H.* married *E. L.* *T. H.* being then Thirteen Years old, and *E. L.* Nine Years, and no more. Afterwards *T. H.* came to Fourteen Years, and diſagreed to the ſaid Marriage. All this was pleaded in Bar as a Performance of the Covenant, and good. The Covenantor is bound that *T. H.* ſhall marry *E. L.* which was executed, but he is not bound to the Continuance of it, that ought to be left to the Law. If I be bound to you, that *J. S.* (who in Truth is but an Infant) ſhall levy a Fine before ſuch a Day, which is done accordingly, and afterwards the ſame is reverſed by Error, yet the Condition is performed. 1 *Leon.* 52. *Leigh* and *Hannoer*.

A Merchant covenant, that if a Maſter of a Ship will bring his Freight to ſuch a Port, he would pay him ſo much, and Part of the Goods were taken by Pirates, and the reſt he unladed; he ought not to pay the Money, be-

becauſe the Agreement was not performed. 1 *Brownl.* 21. *Bright* and *Cowper.*

Performance in a Plea is intended of actual Performance. *Vide* 2 *Lev.* 67. Surrender.

Agreement to ſurrender a Copyhold to ſuch a Uſe. If a Surrender into the Hands of Two Copoholders, according to the Cuſtom, be ſufficient Performance. 1 *Lev.* 293. *Beauy* and *Turner.*

C. C. made a Jointure to *Mary* his Wife, and died without Iſſue, and the Land deſcended to *T. C.* his Brother and Heir, who grants an Annuity or Rent-charge of 200 *l. per Annum* to Truſtees in Truſt for *Mary*, and this to be in Diſcharge of the Jointure. *Hab.* to them, their Heirs, Executors, Adminiſtrators, and Aſſigns, for the ſaid *Mary* for Life; with a Clauſe of Diſtreſs, and a Covenant to pay the 200 *l. per Ann.* to the Truſtees for the Uſe of *Mary*. And the Breach aſſigned was, That the Defendant had not paid it to them to the Uſe of *Mary*. *Per Cur'*, This Rent-charge is executed by the Statute of Uſes by expreſs Words, and though the Power of Diſtraining is limitted to the Truſtees by the Deed, yet the Statute transfers the Power to *Mary*, and ſhe may diſtrain alſo, and Covenant lies in this Caſe. 2. The Aſſignment of the Breach according to the Words of the Covenant is good: And if any Thing be done which amounts to a Performance, they may plead it on the other Side. As the Defendant may plead the Money was paid to *Mary*, which is a Performance in Subſtance, but it ſhall not be intended without being pleaded. 2 *Mod.* 138. 1. *Mod.* 223. Statute of Uſes.

If

If *A.* covenant with *B.* before *Easter* next to assure his House to him and *K.* his Wife, during the Life of *J. S.* and *A.* surrenders his House to the Use of *B.* and such as *K.* shall name at the Request of *B.* In this Case the Covenant is broken, for this is no Performance of it.

If Lessee covenant to pay his Rent to the Lessor, and he pays it before the Day, the same is not any Performance of the Covenant; contrary of a Sum in Gross. 1 *Leon.* 136.

CHAP.

CHAP. XLVII.

Performance.

Within what Time, or upon Requeſt.

DEclaration, That the Defendant by his Deed, bearing Date, *&c.* did covenant, That he would do every Act and Acts at his beſt Endeavour to prove the Will of *J. S.* or otherwiſe, that he would procure Letters of Adminiſtration, by which he might convey ſuch a Term lawfully to the Plaintiff, which he had not done, *Licet ſæpius requiſitus.* Defendant pleads, That he came to Dr. *Drury* in the Court of the Arches, and there offered to prove the Will of *J. S.* but becauſe the Wife of *J. S.* would not ſwear that it was the Will of her Husband, they could not be received to prove it. Plaintiff demurs. *Per Cur'*, Tho' there be no Time limited by the Covenant when the Thing ſhould be done by the Defendant, yet he hath not Time during his Life; but he ought to do it upon Requeſt within convenient Time: But in ſome Caſes, a Man ſhall have Time during his Life, as where no Benefit ſhall be to any of the Parties; as if it were to go to *Rome*, and as to the Requeſt, he ought to have ſhewed it ſpecially with the Place and Time, for it is for the Benefit of the Covenantee; for without Requeſt, the Action doth not lie, and the Bar ſhall not help the inſufficient Declaration. *Per Gawdy*, The bringing the Action is a Requeſt; *Clench*, A Writ of Debt is a *Præcipe*, for which there,

Licet

Licet ſepius requiſitus, is ſufficient; but a Writ of Covenant is not ſo. 1 *Leon. p.* 124, 125. *Cater* and *Booth.*

A Covenant for Payment of Money, and no Time is limited: It is to be paid preſently, that is, within convenient Time. So in other Covenants to do tranſitory Acts, as Delivery of Charters, *&c.* *Aliter* of Local Acts. 6 *Rep.* 30. 1 *Inſt.* 208. *Cro. Eliz.* 298. *Pop.* 198.

Covenant to make a *Retraxit* of Suit: He ought to do it in convenient Time. So if it be to acknowledge Satisfaction in ſuch a Court. 1 *Roll. Abr.* 436.

A Covenant to make further Aſſurance at all Time and Times, and the Covenantee adviſeth he ſhall levy a Fine, he ſhall have convenient Time to do it; for the Words [*at all Times*] ſhall have a reaſonable Conſtruction. 1 *Roll. Abr.* 441. *Pierpoint* and *Thimbleby.*

Where by the Covenant a Thing is to be performed upon Demand; yet he ſhall have reaſonable Time to perform it after the Demand. 15 *Ed.* 4. 30.

Where the Act to be done is of its own Nature Local, as to make a Feoffment, *&c.* There the Covenantor, no Time being limited, hath Time during his Life to perform it, if the Coventee doth not haſten the ſame by Requeſt; for this is collateral, and not like to Payment of Money. *Cro. El.* 798. *Noſe* and *Bacon*; yet when the Covenantor may do that that is local in the Abſence of the Covenantee, as to acknowledge Satisfaction in the Court of *B. R.* there he muſt do it in convenient Time. 1 *Inſt.* 208. *a.* 6 *Rep.* 30. *b.* *Bothe's* Caſe.

When the Act being to be done, is local.

If

If the Covenant be to pay without limiting any Time, he is not bound to pay before Requeſt. 1 *Roll. Abr.* 438. *Q.*

If the Covenant be to do a Thing upon Requeſt, the Plaintiff muſt make Requeſt to the Perſon, and not by Proclamation giving Notice of the Requeſt. 1 *Roll. Abr.* 443. *Gruit* and *Pinnell.* But a Condition to do ſuch Acts, *&c.* for the better Aſſurance, *&c.* to *B.* that ſhall be deviſed by *B.* or his Councel, *&c.* *B.* deviſeth a Releaſe, *A.* not being lettered, deſires to ſhew it to Councel before he ſeal it; He ſhall not be allowed reaſonable Time to ſhew it, he having taken it upon him to do it. 2 *Rep. Manſer's* Caſe. 1 *Roll. Abr.* 440.

CHAP.

CHAP. XLVIII.

Covenants void at Law.

DEclaration was, That the Defendant covenanted for the true Impriſonment of *J. S.* who eſcaped; and thereupon the Plaintiff was fined, and forced to pay the Debt. Defendant pleads the Statute of *H.* 6. and that the Covenant was for Eaſe and Favour of *J. S.* Plaintiff replied, The ſaid Covenant was entered into for better Security, *abſque hoc*, that it was for Eaſe and Favour. Defendant demurred, and Judgment *pro* Defendant, becauſe there was a Covenant to pay Chamber-Rent, *&c.* which in it ſelf is for Eaſe and Favour. *Raym.* 222. *Moſedell* and *Middleton.*

Agreement, That he before *Eaſter*-Term next following, at the Requeſt of the Plaintiff, would ſurrender up to the Plaintiff his Letters-Patents of the Stewardſhip of *Bromeſgrove*, to the Intent that he might renew the Letters-Patents in his own Name. The Stewardſhip of a Court-Leet is within the Statute 5 *Ed.* 6. *c.* 16. of buying of Offices. 1 *Brownl.* 71. *Williamſon* and *Barnſly.*

Coleſhill the Teſtator had the Office of Surveyor of Cuſtoms by Letters-Patents to him and his Deputies; and by Indenture between him and *Smith* for 600 *l.* paid, and 100 *l. per Annum* to be paid during the Life of *Coleſhill*, makes Deputation of the ſaid Office to *Smith*; and *Coleſhill* covenants with *Smith*, That if *Coleſhill* die before him, that then his Executors ſhall pay to

to him 300 *l.* and *Coleſhill* was bound to *Smith* for Performance. *Per Cur'*, The Bond was void, as againſt the Stat. 5 & 6 *Ed.* 6. *of Buying of Offices.*

No Leaſe to be made of any Benefice or Eccleſiaſtical Promotion, or any Part thereof; and not being impropriated, ſhall endure any longer than while the Leſſor ſhall be ordinarily reſident, and ſerving the Cure of ſuch Benefice without Abſence above 80 Days in any one Year; and all Bonds and Covenants for ſuffering any ſuch Parſon to enjoy any ſuch Benefice with Cure, ſhall be void. 13 *Eliz. cap.* 20. 14 *Eliz. c.* 12. either by Parſon or Curate; and ſo the Stat. 13 *Eliz.* of Leaſes made by Parſons, that upon Non-reſidence for 80 Days, the Leaſe ſhall be void. This Statute voids Bonds and Covenants for Non-reſidence.

Covenants upon uſurious Contracts are alſo void, and Bonds of Covenants upon ſuch Contracts.

In Action of Covenant on Articles, whereby the Parties, 8 *March*, on Loan of 500 *l.* for Seven Years, from 12 *Novemb.* before paying 15 *l.* half Yearly for Intereſt, the firſt Payment to be on *Pentecoſt*. *Vid. infra.*

Debt on Bond to perform Covenants in an Indenture, which was to pay Rent. Defendant pleads the Stat. 32 *H.* 8. which makes Leaſes to alien Artificers, void. *Sid.* 357. *Freeman* and *King*.

Covenant to do a *Malum in ſe*, is void; ſo a *Malum probibitum*; as if one covenant to maintain another in Suits, or that he will appear in Inqueſt, that he will foreſtall Corn. Tenant in Fee ſimple of Lands covenants, That he will not alien it: Covenant that a Tradeſman will not exerciſe his Trade, if it be abſolute, it's void.

Generally where the Matter being in a Condition, will make the Condition void, becauſe it is againſt Law; there it being in a Covenant, will make the Covenant void.

And yet a Man may reſtrain himſelf where the Law doth not reſtrain him; as Tenant covenants, That he will not cut any Fuel without the Aſſignment of the Leſſor, *&c.* for in ſuch Caſes, *Modus & conventio vincunt Legem. Vid. ſupra*, where and in what Caſes Action of Covenant will not lie.

If a Man ſeiſed of Lands in Fee, covenants to ſtand ſeiſed of it to ſuch Uſes as no Eſtate will ariſe by the Covenant; yet it may be good by way of Covenant, and give Remedy to the Covenantee in an Action of Covenant; but with this Difference: If the Covenant be future, as where one Man doth covenant with another, That in Conſideration of a Marriage, his Lands ſhall deſcend, remain or revert to his Son and Heir apparent, and to the Heirs of his Body on the Body of his Wife; in this Caſe the Covenantee may have a Writ of Covenant; for if the Covenant be preſent, as that a Man and his Heirs ſhall from henceforth ſtand and be ſeiſed to ſuch and ſuch Uſes, and the Uſes will not ariſe; by Law in this Caſe, no Action of Covenant will lie for the Covenantee in this Caſe; for un-action of Covenant will not lie, but where it is covenanted that a Thing ſhall be done hereafter, or hath been done heretofore, and not for a Thing preſent; as when *A.* doth covenant with *B.* That his black Horſe ſhall be for ever the Horſe of *B.* this is no good Covenant; and albeit he keep the Horſe, ſtill *B.* can have no Remedy. *Plo.* 307, 308. 27 *H.* 8. 16. *Finch. Ley* 49.

What

What Covenants are void.

Againſt Law.

The Sheriff of a County makes *B.* Under-Sheriff, and takes a Covenant of the Under-Sheriff, That he ſhall not ſerve Executions above 20 *l.* without his Special Warrant. This is a void Covenant, for that it is againſt Law and Juſtice; for the Under-Sheriff is liable to execute all Proceſs as well as the Sheriff. *Hob. Norton* and *Simms.*

If Covenant be to do a Thing *malum in ſe*, it's void. 1 *Inſt.* 206. *b.*

Covenant, That he ſhall not levy a Fine within 4 *H.* 7. or that he ſhall not ſuffer a Common Recovery, it's void. 10 *Rep.* 386. *b.*

If one covenant, That he will maintain another in his Suits, or that he will appear in Inqueſts, or that he will foreſtall Corn, *&c.* Theſe are againſt Law, and void.

If a Man be a Tradeſman, and he covenants, That he will not uſe or exerciſe his Trade: This Reſtraint, if it be abſolute and continual, is void; but if it be *ſub modo* only, as that he ſhall not uſe his Trade for ſome Time, or in ſuch a Town only, this is good.

If *A.* owe Money to *B.* and *B.* owe Money to *C.* and *B.* doth make a Letter of Attorney to *C.* to ſue *A.* at his own Charge; and *B.* doth covenant with *C.* that he will not releaſe the Debt to *A.* tho' in this Caſe it be Maintenance in *C.* to ſue at his own Charge, yet the Covenant is not againſt Law.

Debt upon a Bond for Performance of Covenants: Plaintiff aſſigns a Breach. Defendant demurs. It was an uſurious Covenant, and againſt Law; and a Breach cannot be aſſigned in omitting the doing of that which is unlawful to be done. *Cro. Jac.* 378.

Impoſſible.

Covenant to aſſign to the Covenantee a Commiſſion of Bankrupt, void. So a Bond. *Street* and *Daniell*; for it's impoſſible to aſſign the Commiſſion.

Covenant to go from St. *Peter's* Church in *Weſtminſter*, to the Church of St. *Peter's* in *Rome* in three Hours; it's impoſſible. 1 *Inſt.* 206. *b.*

If a Man covenant to do a certain Thing before a certain Time; altho' it become impoſſible by the Act of God, yet this ſhall not excuſe him, in as much as he had bound himſelf preciſely to do it. 1 *Roll. Abr.* 450. Q.

If a Man covenant to leave a Wood in as good Plight as he finds it: If the Trees are thrown down by Tempeſt, by this the Covenant is not broken, for now it is become impoſſible by the Act of God, and in this Caſe the Covenantor is not bound to ſupply it.

If one covenant to ſuſtain Houſes or Sea-Banks, or covenants to leave them in as good Caſe as he finds them: If the Houſes are burnt, or thrown down by Tempeſt, or the Sea-Banks overthrown by a ſudden Flood, the Covenant is not broken by this Accident only; but if the Covenantor do not repair, and make

up

up theſe Things in convenient Time, the Covenant will be broken. *Perk.* Sect. 738. *Plo.* 227. 5 *Rep.* 15.

If in a Deed ſome Covenants are againſt Law, and ſome good: Thoſe which are againſt Law, are void *ab initio*, and the reſt ſhall ſtand. 11 *Rep.* 27. *Pigot's* Caſe.

CHAP. XLIX.

What will extinguish, suspend or discharge a Covenant.

Discharging of Parcel of the Covenant, not a Discharge of the Residue.

IF the Owner of a Ship covenant with *B.* That he will receive such Loading that he shall appoint at *Y.* by such a Day, and then to go with the first fair Wind to *R.* and there unload, and take in other Wares; and after *B.* discharges him of the taking in of the Goods at *Y.* but that he shall receive his Loading at *R.* This Discharge of Parcel of the Covenant, is not any Discharge of the Residue; *Smith* and *Barnes*; for these are several. 1 *Roll. Abr.* 472.

By Rasure, Breaking off the Seal, by Rasure of the Date after the Delivery, *&c.* Covenants may be avoided.

Where the Covenants are several, if the Seal of one of the Covenantors be broken off, yet this shall not avoid the Deed but as to him only. *Aliter*, where the Covenants are joint; there, by the breaking one of the Seals of the Covenantors, all the Covenants are defeated. 5 *Rep.* 22. *Mathewson's* Case.

By ceasing of the Estate.

If the Estate be created, and a Covenant in Law annexed to it, if the Estate cease, the Covenant shall cease; if express Covenant be annexed, *aliter*. *Vid.* 2 *Brownl.* 162, 163.

By Alteration of a Corn-mill into an Horse-mill, Lessor discharged of his Covenant.

The Mayor and Citizens of *London* covenanted to find eight Men to grind every Day in *Bridewell*-Mill, which they let to the Defendant; and agreed, That if they failed therein, the Defendant should retain so much of

of the Rent out of his Rent: The Defendant pulled down the Corn-Mill, and made it an Horſe-Mill, and would now defalk ſo much out of his Rent as he ought to be allowed for the eight Men. *Per Cur'*, By the Alteration of the Mill in this manner, the Leſſors are diſcharged of their Covenant. *Cro. Jac.* 182. *City of London* againſt *Greyme.*

Leſſee covenants to repair. Leſſor grants the Reverſion to another: Grantee of the Reverſion ſhall not recover Damages but from the Time of the Grant, and not for any Time before: And by *Mamwood*, by the Recovery of the Damages, the Leſſee ſhall be excuſed ever after for making of Reparations; ſo as if he ſuffer the Houſes, for want of Reparations, to decay, no Action ſhall be brought thereupon after for the ſame, but that the Covenant is extinct. 3 *Leon.* 51.

Where by the Recovery of Damages, the Leſſee ſhall be excuſed ever after for making Reparations, but the Covenant is extinct.

Covenant brought againſt the Aſſignee of Leſſee for Years. Whereas he made a Leaſe for Years reſerving Rent, *&c.* Leſſee covenanted to build an Houſe upon the Land within the firſt ten Years, that he aſſigned over his Term. He brought the Action againſt the Aſſignee. Aſſignee pleads, That the Leſſor entered, and had Part of the Poſſeſſion for Part of the ninth Year. It's not good: That *B.* did enter is too general, and ſhall be taken ſtrictly againſt him that pleads it; and it may be that he entered by Wrong, and ſo it may be he entered by Right, as for Non-payment of Rent, as the Truth was; and if he entered lawfully, then it is no Suſpenſion or Extinguiſhment of the Covenant; and if the Covenant was ſuſpended, it was only for the Time the Leſſor had Poſſeſſion, and the

Covenant to build. Entry of the Leſſor pleaded. Defendant ought to ſay, That he would not ſuffer him to build.

Party hath not anſwered the Time before or after; and cited a Caſe, *M.* 28 & 29 *El.* in *B. C.* Leſſee for five Years covenanted to build a Mill within the Term, and becauſe he had not done it, Leſſor brought Action of Covenant. Defendant pleads, That within the laſt three Years, the Leſſor held him out, *&c.* ſo as he could not build it. *Per Cur'*, He ought to ſay, That the Leſſor with Force held him out, otherwiſe it would be no Plea; and in the principal Caſe, he ought to have ſhewed, that he would not ſuffer him to build. *Godb.* 69, 74. *More* 402. *Barker*'s Caſe.

No Act of the Leſſee ſhall diſcharge himſelf, or his Executors, of a Special Covenant to pay Rent, of which the Aſſignee of the Reverſion ſhall have Advantage.

It is reſolved in *Brett* and *Cumberland*'s Caſe, That no Act of the Leſſee ſhall diſcharge himſelf, or his Executors, of a Special Covenant to pay Rent, of which the Aſſignee of the Reverſion ſhall have Advantage, *per Stat.* 32 *H.* 8. Sir *Tho. Jones* 144. *Aſhborn* and *Munjoy.*

Leſſee covenants to repair the Banks, which by ſudden Floods are broken down, under Penalty of 10 *l.* Leſſee is excuſed of the Penalty, but he muſt repair in convenient Time. *Dyer* 32.

S. covenanted jointly and ſeverally with two ſeverally, and afterwards one of the Covenantors marries with one of the Covenantees. *Per Mallet*, the Covenant is gone. *March* 103.

Covenant by two, artificially to build an Houſe: The one makes Default, and the Iſſue is found for the other. The firſt ſhall be diſcharged. *Sid.* 76. *Boulter* and *Ford.*

Where a Covenant is become impoſſible to be done by the Act of God; as where one doth covenant to ſerve another ſeven Years, and he die before the ſeven Years expired:

By

By this the Covenant is discharged. 1 *Rep.* 98. *Plo.* 286.

By Release. *Vid. Release.*

By Determining the Estate. *Vid. Post.*

If one covenant to leave a Wood in the same Plight he finds it, and he cuts down the Trees, the Covenant is broken presently, for it is now become impossible by his own Act; but if the Trees are blown down with the Wind, the Covenant is not broken, for now it is become impossible by the Act of God, and the Covenantor is not bound to supply it.

Covenantee forbids the Covenantor to perform his Covenant.

If *A.* covenant with *B.* to build an House by a Day, and *B.* doth forbid him, and thereupon he doth forbear to do it; the Covenant is broken, and this will not excuse him: But if he do by an actual Impediment hinder him, or be the Cause why the Thing is not done, then the not doing it is no Breach of Covenant: And therefore if a Lessee covenant to cleanse one of the Ditches in the Lands demised, and the Lessor enters upon the Land it self, and keeps out the Lessee, and he doth not cleanse the Ditch by the Time, by this the Covenant is broken: But if the Lessee doth by Force keep the Lessee out of the Ditch or Place it self, *contra. Trin.* 36 *El. B. R. Carrell* and *Reade.*

What ſhall excuſe the Performance of a Covenant, or not.

Act of God.

A Man covenants to do a Thing which becomes impoſſible by the Act of God.

If a Man covenant to do a certain Thing before a certain Time, tho' it become impoſſible by the Act of God; yet this ſhall not excuſe him, for as much as he preciſely bound himſelf to do it. 1 *Roll. Abr.* 450.

A Man covenants to deliver Goods at *London*, and the Boat is over-turned by Tempeſt; yet this ſhall not excuſe him. *Tompſon* and *Miles*, *Trin.* 32 *El. B. R.* Q.

Covenant to build an Houſe, and the Plague is there.

If a Man covenants to build an Houſe before ſuch a Day, and afterwards the Plague is there before the Day, this ſhall excuſe him from the Breach of the Covenant for not making it before the Day; for the Law will not compel him to venture his Life, but he ought to do it after. 1 *Roll. Abr.* 450. *Lawrence* and *Preatiman*.

Diverſity where the Law creates a Duty; and where the Party by his own Contract makes a Duty.

As to this, there is a Diverſity: Where the Law creates a Duty or Charge, and the Party is diſabled to perform it without any Default in him, and hath no Remedy over, there the Law will excuſe him; as in caſe of Waſte, where the Houſe is deſtroyed by a Tempeſt: But when the Party by his own Contract or Covenant creates a Duty or Charge upon himſelf, *aliter*; as if Leſſee is bound to repair, tho' it be burnt down by Lightning, he muſt do it. *Allen* 27.

A Man

A Man covenants, That his Son ſhall marry the Covenantee's Daughter; If the Daughter refuſeth, yet the Covenant is broken; for the Daughter is a Stranger, and he hath taken it upon him that his Son ſhall marry her. *Perk.* 756.

One covenants, That his Son ſhall marry the Covenantee's Daughter, and ſhe refuſeth.

In Leaſe for Years, *N.* covenants to repair, *&c.* and to yield up at the End of the Term: But during that, one *B.* enters by elder Title, the Leſſee by that is diſcharged of the Covenant to yield up all; if the Land be gone, the Covenant is diſcharged. *Noy* 75. *Andrews* and *Needham.*

If the Land be recovered, the Covenant to yield up is diſcharged.

Acts of him that is to have the Advantage.

If Leſſee for Years covenants to convey the Water which ſtands upon the Land, before ſuch a Day; and after the Leſſor enters before the Day, and continues there till the Day paſt; yet this ſhall not excuſe the Performance of the Covenant, for that it is collateral to the Land. *Hill.* 37 *El. B. R.* 1 *Roll. Abr.* 453.

Covenant collateral.

If a Man covenant with me to collect my Rents in ſuch a Town, and I interrupt him, this ſhall excuſe the Covenant. *H.* 37 *El. B. R.*

Where Interruption ſhall excuſe.

Declaration, That the Defendant covenanted to deliver to him 1500 Meaſures of Saltpetre before ſuch a Day, and that he had not done it. The Defendant demands *Oyer* of the Deed, in which the Covenant was as before: Provided, That if any Miſchief happen by Fire or Water to diſable him, he ſhall be excuſed; and pleads he was diſabled by

Diſability.

Variance.

by Fire: Iſſue, and Verdict *pro Quer'*. Moved in Arreſt of Judgment, That there was a Variance in the Deed, on which he declares; and this produced in Court, for one is abſolute, the other conditional: But Judgment was given *pro Quer'*; for he need not declare on more of the Deed than the Covenant, and it is on the Part of the Defendant to ſhew the *Proviſo*, which goes by way of Defeazance of Covenants. 1 *Levinz.* 88. *Elliot* and *Blake.*

If the Thing to be performed by the Covenant may not be performed without the Preſence of the Covenantee, there his Abſence ſhall excuſe the Performance. 1 *Roll. Abr.* 457. As if the Covenant be to make a Feoffment to the Obligee.

If a Man be bound to *B.* that *J. S.* ſhall marry *Jane E.* before ſuch a Day, and before the Day *B.* marries her himſelf: Hereby the Covenant is diſcharged. 1 *Inſt.* 206.

Pyracy no Excuſe of Breach of Covenant. 1 *Brownl.* 21.

In what Caſe burning down by Fire ſhall be an Excuſe.

If Leſſee for Years of an Houſe covenant to repair, and to leave it in as good Plight as he found it, and after certain Sparks of Fire come out of the Chimney of the Leſſor into this Houſe near adjoining, by which the Leſſee's Houſe is burnt down; this ſhall excuſe the Performance of the Covenant, ſo that he is not bound to re-edifie it, becauſe it came by the Act of the Leſſor himſelf. 1 *Roll. Abr.* 454.

Cove-

Covenant to enfeoff the Covenantee before such a Day; and after and before the Day the Covenantee disseiseth the Covenantor, and keeps it with Force and Arms till after the Day, so that the Covenantor cannot enter; this shall excuse the Performance. 8 *Rep.* 92. *Frances*'s Case. Covenantee disseiseth the Covenantor.

If Lessee for Years covenant to relinquish Part of the Land at the End of the Term, fallowed and fit for Wheat, *Proviso*, the Lessee upon such Warning may surrender and depart at any Feast of *Michaelmas*, at any Time within the Term performing the Covenants; if he after Warning surrender, and doth not leave the Land fallowed, he hath forfeited his Covenant, for the Acceptance of this Surrender doth not dispence with the Covenant, in as much as by the Covenant he is to accept it. *Moyle* and *Austen*. 1 *Roll. Abr.* 455. Acceptance of a Surrender does not dispence with the Covenant.

Covenant not to assign without the Lessor's Consent, is not discharged by the Lessor's Entry into Part of the Land. *Stiles*, *p.* 265. *Collins* and *Silly*. It being a Collateral Covenant. Collateral Covenant.

A Condition recited, That the Defendant served the Plaintiff as a Brewer's Clerk, and that if he performed such Covenants, *&c.* Defendant pleads, *Performavit omnia*. Plaintiff replies, That one of the Covenants was to give the Plaintiff a true Account of all such Monies as the Defendant should receive when requested; and alledgeth, that 30*l.* came to his Hands, and he requested, and he refused. Defendant rejoins, confessing the Receipt, saith, That before the Request made

Excuſe that he was robbed.

made by the Plaintiff, he laid it up in the Plaintiff's Ware-houſe, and that certain Malefactors (to the Defendant unknown) ſtole it away, *Et hoc prædict'*, *&c.* Plaintiff demurs generally:

1. Becauſe it is a Departure, it's rather an Excuſe than Account.
2. He ought not to have averred his Plea, but concluded to the Country; for the Plaintiff in his Replication alledgeth 30*l.* the Defendant gave no Account, and the Defendant in his Rejoinder ſets forth, he did give Account. There was an Iſſue;

But both were over-ruled:

Departure.

1. It is no Departure, but a Fortification of the Bar; for ſhewing that he was robbed, is giving an Account.

Concluſion of a Plea.

2. The Concluſion is proper, becauſe the Defendant alledgeth new Matter, and therefore ought to give the Plaintiff Liberty to come in with a Sur-rejoinder, and anſwer to it; for he doth not ſay, he gave an Account, but ſets forth the ſpecial Matter how. 1 *Vent.* 121. *Vere Smith.*

A Covenant of a Charterparty for the Freight of a Ship. Defendant pleads, That the Ship was loaden with *French* Goods, prohibited by Law to be imported. Upon Demurerr, Judgment was given *pro Quer'*. For *per tot' Cur'*, If the Thing to be done was lawful

lawful at the Time when the Defendant did enter into the Covenant, though it was afterwards prohibited by Act of Parliament, yet the Covenant is binding. *Durus Sermo.* 3 *Mod.* 39. *Braſon* and *Deane.*

A Thing lawful to be done at the Time of the Covenant, afwards prohibited.

Some other good Caſes.

Note, If the Deed it ſelf, wherein the Covenants are, or the Eſtate on which the Covenants, as Acceſſary to the Principal, do depend, is gone and determined, there regularly the Covenants are gone alſo; and therefore if a Leaſe for Life or Years be ſurrendred, whereby the Eſtate is gone, or a Deed becomes void by Raſure or the like, and there be Covenants in the Deed, hereby the Covenants are gone alſo; but this Surrender doth not diſcharge the Breach. *Dyer* 28. 5 *Rep.* 23. 40 *Ed.* 3. 27. *Brook Surrender* 47. *Covenants* 42.

Walker againſt the Dean and Chapter of *Norwich, Trin.* 9 *Jac. Rot.* 1414. Action of Covenant brought upon an expreſs Covenant in a voidable Leaſe, and the Queſtion was, If the Covenant be good, the Leaſe being void? And adjudged, *Trin.* 10 *Jac.* that the Action lies well, altho' the Leaſe be void, and *Mape's* Caſe was cited. *Brownl.* 1. *p.* 21.

If a Leſſee covenant for him, and his Aſſigns, to build an Houſe upon the Land demiſed within 7 Years, and the Leſſee aſſign it over; in this Caſe the Aſſignee is chargeable, 5 *Rep.* 17. But if a Man covenant for him and his Aſſigns, to make a Feoffment, Obligation, or the like; in this Caſe the Aſſignee

ſignee ſhall not be charged, albeit he be named.

Leſſee covenanted, That he would repair the Houſe with convenient, tenantable and neceſſary Reparations. Leſſor brings Covenant, and alledgeth a Breach for not repairing for Want of Tiles, and Dawbing with Morter; and did not ſhew, that it was not tenantable. The Opinion of the Court was, That he ought to have ſhewed it; for the Houſe may want ſmall Reparations, as a Tile or two, and a little Morter, and yet have convenient, tenantable and neceſſary Reparations. *March* 17. *Conisby*'s Caſe.

If I covenant, That a Man ſhall enjoy ſuch Land until or *ad* the 15th of *April*, the 15th Day ſhall be taken excluſive.

CHAP.

CHAP. L.

Covenants determining with the Eſtate, or of ſuing Covenants after the Eſtate determined.

IT is commonly ſaid in our Books, that Covenants in a void Deed are void; in *Sopran* and *Skurri*'s Caſe, *Yelv.* 18. The Declaration doth not expreſs that Z. did demiſe the Houſe, and if there be no Demiſe, there is no Term; and the Indenture was ſealed on the Part of the Leſſee, and not on the Part of the Leſſor, (for any Thing that appears): And if Leſſee ſeals his Part, and not the Leſſor, *nihil operatur*, neither in reſpect of the Intereſt, nor in reſpect of the Covenants, for the Covenants depend upon the Leaſe, and the Bond on the Covenants; and if the Leaſe had been made, and after ſurrendred, all the Covenants and Bonds for the Performance thereof had been void alſo; but yet in ſome Caſes, the Acceptance of the Surrender ſhall not diſpenſe with the Covenant, as *Noy* 18. *Auſtin* and *Moyle*, 1 *Leon.* p. 179. *Cheney* and *Langley*. *Auſtin* and *Moyle*'s Caſe was, *A.* leaſes by Deed to *M.* for Ten Years, and *M.* covenants at the End of the Term to leave Four Acres of the Land fallowed and ploughed; and in it alſo there was a Proviſo, That if *M.* miſlike his Bargain, that upon a Year's Warning he may ſurrender his Eſtate; and *M.* ſurrendered, but left not any fallowed: * The Acceptance of the Surrender hath not diſpens'd with the Covenant, but upon a void Leaſe the Covenants

Leſſee ſeals his Part, and not the Leſſor.

* Acceptance of a Surrender diſpenſeth not with a Covenant to do a future Act.

nants are void, as in *Capenhurſt*'s Caſe, 1 *Keb.* 131, 164, 182. Bond for Performance of Covenants, that the Grantee ſhall quietly enjoy a Term; but the Grant was of ſo much of the ſaid Term as ſhall be unexpired at his Death, which, as *Chedington* and *Groſvenor*'s Caſe, 7 *Dier*, is void, and ſo the Covenants depending thereupon are void alſo. *Windam* put a Difference, and it was agreed, Where a Deed is void in the Fabrick, there the Covenants on it are void, as when a Freehold is to commence *in futuro*, and where there is only want of Intereſt in the Party-Grantor; but that Deed is good: Which the Court agreed, if the Intent is, that the Covenant ſhall go with the Leaſe, which if void, that falls. Leaſe of Tenant *pro* Life for Twenty one Years, with Covenant to enjoy during the Term, and Bond according; by his Death the Bond falls. In *Dier*, there was an Opinion, that Debt lay on Bond, notwithſtanding a Releaſe of Covenants in an Indenture, to which the Obligation relates; but that Caſe is ſettled, that the Bond and Covenants to which it relates are but one Aſſurance, and the one being made void, the other falls: *Vid. Sid.* 307. 2 *Keb.* 116. Tenant for Life makes a Leaſe for Years, Leſſee by Indenture grants and ſells all his Eſtate, *Hab' in tam amplis modo & forma*, as he ought to hold it. Leſſee for Life dies, he in Reverſion enters; Bargainee brought Covenant againſt the Bargainor, it lies not. Here is no Warranty in Deed or Law, but only an Aſſignment; and if there were a Warranty, yet the Covenant determines with the Eſtate; as Tenant in Tail makes a Leaſe for Years, and dies without Iſſue, the Covenant

Diverſity, where a Deed is void in the Fabrick, and where there is only want of Intereſt in the Party-Grantor.

Debt lies not on the Bond after Releaſe of Covenants.

nant doth determine with the Eſtate, *Cr. El.* 157. *Lyndidale's* Caſe, 1 *Anderſon* 12. *Serle's* Caſe.

But let the Leaſe be good or void, yet when there is an Eviction, Covenant lies, tho' the Leaſe be originally void.

Upon Eviction Covenant lies, tho' the Leaſe be originally void.

Covenants in Law extend to lawful Evictions, and to Eſtate in Being, and not where an Eſtate is determined; as Leſſee for Life makes a Leaſe for Years, and dies, Leſſee ſhall not have Action of Covenant, or Covenant in Law, 9 *Eliz. Dier.* 2 *Brownl.* 163, 164.

Capenhurſt's Caſe was:

Debt on Bond conditioned for Performance of Covenants in an Indenture, by which the Defendant's Teſtator being Leſſee for Years of a long Term, aſſigned ſo much of the Term as ſhall be to come at the Time of his Death to the Plaintiff, and covenants that he ſhall enjoy it; and he makes the Defendant Executor, and dies, and aſſigns a Breach, that the Defendant after the Death of the Teſtator ouſted him; and after Verdict *pro Quer'*, it was moved in Arreſt of Judgment, that the Aſſignment of ſo much of the Term as ſhould be to come after his Death was void, and ſo is the Covenant alſo; for the Covenant cannot ſubſiſt without an Eſtate, and that the Aſſignment was void, were cited, 1 *Rep.* Rector of *Chedington's* Caſe, and *Gravenar's* Caſe in *Dyer*, and 2 *Cr. Child* and *Baylie's* Caſe; and ſo is the Covenant, *Yelv.* 18. *Sopranie's* Caſe, and of that Opinion was the Court: But it was further moved, that then the Oligation is ſingle; for if the Condition refer to a Thing that is not, it is all one as if there were not any Condition,

Obligation to perform Covenants, where there are not any, the Obligation is ſingle.

Obligation to perform Covenants in a void Grant, all void.

and to this the Court inclined; but afterwards the Covenant and Obligation being both for the Corroboration of a Grant which was void, they are alſo both void, and the Court gave Judgment *pro* Defendant, 1 *Lev.* 45.

In Covenant the Plaintiff declares, Whereas the Queen by her Letters Patents granted Licence to him, his Deputies and Aſſigns, to buy *Spaniſh* Wooll, and to tranſport it hither *&c.* He by Indenture granted to the Defendant and to *R. N.* the ſaid Licence for Eight Years; in Conſideration whereof, the Defendant did covenant and grant to pay him 100 *l.* every Year at Two Feaſts, *(viz.)* the Annunciation, and *Michaelmas*; and further, That every Year at the Feaſt of the Annunciation, or within Twenty Days after, he would make a new Obligation of 150 *l.* for the Payment of the ſaid 100 *l.* the next Year, and alledges *in facto*, that the Defendant had not paid him the 50 *l.* due to him at *Michaelmas*, 28 *E.* and that he did not make an Obligation at the Annunciation, *&c.* and for thoſe Covenants broken he brought the Action. The Defendant pleads, that in the Indenture is contained, *Proviſo ſemper*, that if the Defendant doth not every Year make the Bond at the Feaſt of the Annunciation, or failed in Payment of the Money at the Day; that then and from thenceforth the ſaid Indenture, and every Clauſe, Article and Sentence therein, ſhould be void and of none Effect, and ſhewed that he failed in making the Obligation at the firſt Day, and ſo the Indenture is void. Judgment *ſi actio.* The Action lies, for this Covenant broken before the Indenture became void; but they agreed, that

Proviſo, If he does not pay ſuch Money at ſuch Feaſts, the Indenture to be void: Action lies for Covenant broken before the Indenture is void.

that for the Covenant for Payment of the Money no Action did lie, becauſe the Indenture was void half a Year before by not making the Obligation, and the Intent of of the Party was, that it ſhould be void only to have Benefit of Covenants broken *in futuro*, but for Covenants broken before it was never their Intent, but that the Party ſhould have Advantage of them. But by *Wray*, the Thing that makes the Indenture void is the breaking of the Covenant, ſo they are both at one Time, and ſo he hath had all his Bargain and all his Benefit of the Indenture, and ſo the other Party is at large. Judgment *pro Quer'*. *Cr. El.* Dr. *Man* verſus *Gee*.

Pleading.

Requell brought Covenant againſt *Hart*, Parſon of *D*. The Caſe was, That *Hart* let to the Plaintiff Parcel of his Glebe and Tythes for Term of the Life of *Hart*, if he ſhould continue ſo long Parſon, rendring 26 *s*. 8 *d*. Rent; and covenants by another Deed, that the Leſſee ſhall peaceably and quietly have and enjoy the ſaid Land and Tythes, and covenants likewiſe that he had not done any Act or Acts, by which the Plaintiff ſhall be interrupted in the ſaid Leaſe, where *revera* he had made another Leaſe before of them to *J. S.* And the Plaintiff being ouſted by *J. S.* brought this Action againſt the Defendant, who pleads the *Stat.* 13. *El. c.* 10. That Leaſes made by Parſons, otherwiſe than is therein limitted and expreſſed, ſhall be void, and he pleads over the Statute of 14 *El. c.* 11. that Covenants ſhall be of the ſame Validity, and not otherwiſe, as Leaſes by the ſame Per-

ſons; and in as much as the Leaſe is void, there being another more ancient Leaſe *in eſſe*, ſo the Covenant ſhall be alſo. *Gawdy*; the Statute of 14 *Eliz.* doth not intend to avoid any Covenants, but ſuch as were made to corroborate Leaſes made void by *Stat.* 13 *El.* before, and not to defeat Covenants made upon void Leaſes by the common Law, *quod nota adjorn'*, *Hill.* 37 *El. Rot.* 161. in a private Manuſcript.

Stat. 14 *El.* explained.

Moile brought Action of Covenant againſt *Auſten*; Defendant demurs upon the Count, and the Caſe was this: Leaſe for Seven Years to *Auſten* by Indenture of Land, who covenants to leave Part of the Land *ad finem dicti Termini* fallowed and ſturred, fit for Wheat-Seaſon, *Proviſo*, that it ſhall be lawful for the Leſſee at any Time within the ſaid Term, giving Warning to the Leſſor at the Feaſt of St. *Michael*, to depart, *&c.* and he doth not leave it fallow according to the former Covenant: The Q. was, If the Leſſee be bound to leave it fallow or not, when he departs within the Term? For this Power of Departure upon Warning is limited with this Performing of Covenants, *adjorn' nota per Yelverton* and *Tanfield*, That the End of the Term of Seven Years, and the End of the Term, are all one, for both refer to the Intereſt of the Term, and to the Determination, be it by Surrender or otherwiſe; but if it were at the End of Seven Years, this is not before the Seven Years incurr'd without reſpect to the Term: *Vid. Br.* Expoſition of Terms, 44. 35 *H* 8. *Vid. Paget's* Caſe, in the Rector of *Chedington's* Caſe, *Dier. fo.* 177. And after comes *Crook*, who ſaid, that the Plaintiff ſhall not have this Action: For after the

Difference between the End of a Term and Expiration of Seven Years.

the Covenant broken it appears that he had accepted the Surrender of the Term, whereby he is concluded. *Per tot' Cur'*, tho' he had accepted of a Surrender of the Term, yet he may have Covenant for Covenant broken before; but Action of Waſte he may not have, for he accepts of the Land, which is Parcel of the Thing to be recovered by the Action, for which Judgment was given *pro Quer'*. *Hill.* 4 *Jac. B. R.* entred, *P.* 3. *Rot.* 271. *Private Manuſcript.*

Acceptance of Surrender, not concluding to bring an Action.

What Covenants are good in a void Leaſe.

Per Haughton, in *Waller*'s Caſe: If the Covenant depend on the Intereſt of a Leaſe, as a Covenant to pay Rent is void, if the Leaſe is void; but where the Covenant is for a Thing collateral, as a Covenant that the Leſſor is Owner at the Time of the Leaſe, or the that the Leſſee ſhall enjoy it; theſe Covenants being collateral to the Leaſe and Intereſt, are good, tho' the Leaſe be void. *Nichols cont'*. Covenant to ſave the Plaintiff harmleſs againſt *T.* in a void Leaſe, the Leſſee is diſturbed by *T.* the Covenant is good: For when an Eſtate is created in which is implied a Covenant in Law, there if the Eſtate be void, the Covenant is void alſo; but when there is an expreſs Covenant in Deed, *aliter*, altho' the Leaſe be void or voidable; as if he covenant that the Leſſee ſhall enjoy during the Term, and the Leſſee reſign, yet is the Covenant good, altho' the Term is gone, *Owen* 136.

Action on the Leaſe of a Parſon lies for Covenant broken before his Non-reſidency.

Where a Parſon makes a Leaſe for Years, in which were divers Covenants, and after he became Non-reſident, by which the Indenture became void; yet he may maintain an Action of Covenant for a Covenant broken before his Non-reſidency, *Cr. El.* 244.

Condition broken before the Condition performed, whereby the Indenture is void.

Condition to perform Covenants in a Leaſe; Defendant pleads Covenants performed, the Plaintiff by Replication ſhews the Covenants, whereof one was, that he ſhould enjoy ſuch Lands let to him, quietly, *&c.* and ſheweth *in facto*, that the Defendant had diſturbed him. Defendant by Rejoinder ſheweth, that in the Indenture was a *Proviſo*, that if he paid 10 *l.* the 31 of *March*, 30 *El.* that then the ſaid Indenture and all therein contained ſhall be void, and alledged he paid the 10 *l.* at the Day; it was adjudged, that by the Covenant broken before the Condition performed the Bond was forfeit, *Cr. El.* 244. *Hill* and *Pilkington.*

Covenant, for that the Defendant 35 *El.* let to him the Lands for Six Years, and covenanted that he ſhould enjoy it without Interruption during the Term, and diſcharged from Tythes and other Duties: And further covenanted, That if Tythes were demanded and recovered againſt him during the Term, that he ſhould *recoupe* ſo much in his Hands of the Rent as the Tythes amounted to, and for Breach ſheweth, that the Parſon 42 *El.* ſued him, for the Tythes of Corn growing there in the Years, 38, 39 *Eliz.* and ſo brought this Action, and thereupon it was demurred.

Per

Per tot' Cur', this Suit after the Determination of the Term is a Breach of Covenant, for he did not enjoy it diſcharged, *&c.* which is not intended of a real Diſcharge, for that appears not by the Intent of the Parties, becauſe it is agreed, that if he were ſued he ſhould recoup as much Rent in his Hands; but their Meaning was, he ſhould be freed from Suit and Payment of it, and he is as greatly prejudiced by a Suit after the Term, as if he had been ſued before the Expiration of the Term: But it was not alledged that the Suit was lawful, or that the Tythes were due; (for he was not bound to diſcharge him from illegal Suits,) ſo the Breach was not well aſſigned, *Cr. El.* 916. *Lamery* and *Lovering*.

A Suit after the Determination of a Term is, in what Caſe a Breach of Covenant.

Obligation for Performance of Covenants upon a Leaſe void *per* Statute Law is void alſo; as where the *Stat* 32 *H.* 8. makes void Leaſes made of Houſes to alien Artificers, *Sid.* 309. And on Bond to perform Covenants which Way ſoever, the Leaſe becomes void, *per* Releaſe, Surrender, *&c.* the Obligation is void alſo.

Obligation void on a void Leaſe.

Covenants

Covenants to be performed under a Penalty.

In Debt *pro* 150 *l.* Plaintiff declares on a Charterparty, which contained divers mutual Agreements; *Et in performatione conventionum prædictarum ex parte dicti Magistri ipse obligasset se dicto Mercator' in penali summa* 150 *l. & ad performationem conven' prædict' ex parte dicti Mercatoris obligasset se dicto Magistro in simili penali summa* 150 *l.* This Action was brought by the Master of the Ship against the Merchant. The Declaration is insufficient, for when it comes to the Penalty on the Merchant's Part it is only *obligasset se*, omitting *ipse*, or *præd' Mercator' obligasset se*, and so it is not expresly declared that the Defendant was bound. But *Ventris contra*, for it is *obligasset se præd' Magistro*, and none but the Merchant can be bound; and had it been *ipse obligasset*, it had been good, and that is understood; but Judgment was given for the Defendant, 2 *Vent.* 196.

CHAP.

CHAP. LI.

Bonds for Performance of Covenants.

Differences between Action brought on the Covenant, and on the Bond for Performance of Covenants. *Vid.* 1 *Keb.* 371.

DEBT on Bond for Performance of Covenants; the Defendant ſets forth the Covenants by a *Teſtatum exiſtit*, it is ill.

In Action of Covenant, the Plaintiff may aſſign as many Breaches as he will, tho' not in Obligation for Performance; for in that Caſe there ought to be a Certainty, and certainly alledged, *Cr. Car.* 176. *Sims* and *Smith*, 2 *Keb.* 14. 29.

Debt on Bond of Covenants; After Verdict it was moved in Arreſt of Judgment, that the Defendant's Plea was, that *præd' Ed.* did covenant that *R.* was ſeiſed, whereas the Defendant's Name was *Robert* that did covenant; this Miſrecital is not material, becauſe here is a good Affirmative, and the Bond, if this be miſrecited, is ſingle. *Contra*, if it had been an Action of Covenant, or when the Indenture by Prayer of the Defendant is entered *in hæc verba*, 1 *Keb.* 126. *Sid. p.* 49. *Pegg* and *Waters*. Miſrecital.

The Plaintiff aſſigned a Breach in Non-reparations; Defendant pleads, the Plaintiff had acquitted and diſcharged him of all Reparations. Plaintiff demurs. *Per Cur*, this is an Acquittance and Diſcharge of the Reparations

parations for the Time paſt as well as the Time to come, and amounts to as much as if he had releaſed that Covenant; but the Covenant being broken, that Diſcharge ſhall not take away the Action on the Obligation which was once forfeited, 3 *Leon.* 69.

Releaſe.

Demand of Rent.

In Covenant to pay Rent, and in the Declaration there is not any Demand alledged, and it need not, becauſe the Covenant was to pay ſuch a Sum for Rent expreſly; but in the Condition of a Bond to perform Covenants expreſſed in ſuch a Leaſe, one of which is for Payment of Rent, in that Caſe the Bond will not be forfeit without a Demand, 1 *Ventr.* 259. *Norton* and *Harvey.*

Demand of Rent.

If a Bond be with Condition to pay Rent preciſely, there the Leſſee ought to ſeek the Leſſor, and Tender on the Land will not excuſe him; but an Obligation to perform Covenants doth not alter the Nature of the Rent, 2 *Brownl.* 176. *Manly* and *Jennings*, *Hob. p.* 8. *Baker* and *Spain*, but that it ought to be demanded, *Cr. Car.* 76. *Chapman's* Caſe.

Parole Contract may be pleaded in Diſcharge of Damages in Covenant, not ſo in Obligation.

Covenant for Repairs, and for not repairing, the Action is brought. Defendant pleads, That after the Decay he made ſuch a Concord that the Plaintiff ſhould have 30*s.* *&c.* in Satisfaction, *&c.* and ſhews it to be executed. Demurrer, for the Action being grounded upon a Deed, cannot be diſcharged but by a Deed. But *per Cur'*, the Plea is good, for it is not pleaded in Diſcharge of the Covenant, but only for the Damages which are demanded by Reaſon of the Breach, and the Covenant remains. And it is not like to the Caſe of an Obligation with a Condition, which cannot be diſcharged by a Contract, for

for there it is a Duty certain, *Cr. Jac.* 99. *Alden* and *Blague.*

Condition was for Performance of all Covenants, Payments, Articles and Agreements, compriſed in ſuch a Deed, dated, *&c.* The Defendant ſhews, that the Deed was a Deed of Feoffment, wherein was contained, that he for 110 *l.* had enfeoffed the Plaintiff of ſuch Lands, with a *Proviſo*, that if the Defendant paid ſuch a Sum at ſuch a Day the Feoffment ſhould be void, and to re-enter with Covenants to ſave harmleſs from Incumbrances, *&c.* and that he had performed all the Covenants, Articles and Agreements, on his Part to be performed. The Plaintiff aſſigns a Breach, becauſe he did not pay ſuch a Sum at ſuch a Day, according to the *Proviſo*. *Per Curr'*, for as much as there is not any Covenant to pay that Sum, it is a *Proviſo* in Advantage of the Feoffor, that if he paid the Money he ſhould have his Land again, and it is in his Election to pay the Money or loſe the Land; therefore the Condition of the Bond extends not thereto, but it extends to perform the other Covenants, *Cr. Jac.* 281. *Yelv.* 206. *Briſcoe* and *King Knipe*, Vid. *Yelv. but* Vid. hic infra, 2 *Lev.* 116. contra.

Bond to perform Covenants extends not to a *Proviſo* in a Mortgage, there being no Covenant to pay the Money.

Covenant: Whereas the Defendant reciting that ſhe had an Eſtate for Life in ſuch cuſtomary Lands, covenanted that ſhe would ſurrender the Eſtate upon Requeſt, and permit the Plaintiff to enjoy the ſaid Lands, and take the Rents, Iſſues and Profits of 'em; and *in facto* aſſigns for Breach, that ſhe did not ſuffer him to enjoy the ſaid Lands, but had received the Rents, *&c.* from the Time of making the Indenture until the Day of the Writ.

Defendant

Defendant demurs upon the Declaration 1. Becauſe there was not any Requeſt alledged for the Permiſſion, *ſed non alloc'*, for the Requeſt extends only to the Surrender, not to the Permiſſion. 2. That he doth not alledge a ſpecial Diſturbance by Entry, or otherwiſe. 3. The Breach is too general, in aſſigning that ſhe received the Rents, Iſſues and Profits of the Lands, without ſhewing what, ſo as it might be iſſuable, and thereby recover in Damages as much as the Defendant recovered, according as it ſhall be proved to the Jury. But *per Cur'*, in Covenant he may aſſign as many Breaches as he will, tho' not in Debt on Obligation for Performance of Covenants, for in that Caſe there ought to be a Certainty, and certainly alledged, but in a Covenant it may be aſſigned as general as the Covenant is. Judgment *pro Quer'*. *Cr. Car.* 176. *Syms* and *Smith*. Q. the late Act.

Requeſt.

In Covenant the Plaintiff may aſſign as many Breaches as he will, but not on Bond of Performance.

Bonds

Bonds for Performance of Covenants.

Note: The Condition of a Bond was to perform all Covenants generally, which being void, the Bond is ſingle; ſo if there had been a void Indenture, or no ſuch Indenture. 1 *Keb.* 130.

Bonds for Performance of Covenants not to be aſſigned to the King.

Bonds with Condition for the Performance of Covenants, tho' the Covenants, or ſome of them, be for the Payment of Money, yet the Aſſignment of ſuch a Bond to the King ſhall not be received; and if it be aſſigned it ſhall be put out of the Court, for no Bond ſhall be aſſigned, *ut ſupra*, but ſuch as are for Payment of Money; Sir *J. Hawkins* verſus *Chapman* in *Scac'*. 4 *Leon. p.* 9. 2 *Leon.* 55. *contra. Vid. hic infra.*

Covenant to ſave harmleſs from all Things contained in an Indenture, extends not to a Bond for Performance.

A. and *B.* are bound in a Bond to perform certain Covenants in an Indenture, whereof one is to pay certain Monies; and *C.* covenants with *A.* and *B.* to ſave them harmleſs from all Things contained in the ſame Indenture, and after the Monies are not paid according to the ſaid Indenture, by which the Bond is forfeited; yet *C.* is not bound to ſave them harmleſs from the Obligation, for this is a collateral Thing to the Indenture, 1 *Rol. Abr.* 432. *Scot* and *Pope* verſus *Griffin.*

If the Deed be void, then no Covenant in it ſhall bind; as *Yelv.* 18. *Sopran's* Caſe. *A.* poſſeſs'd of a Term for Years, granted ſo much of his Termas ſhall be unexpired at the Time of his Death. Grantee aſſigns, and covenants that the Aſſignee ſhall enjoy it againſt all Perſons. The Plaintiff aſſigns a Breach, and Iſſue, and Verdict *pro Quer'*. This Deed is void for the Uncertainty; but here

If there be not any Covenant, the Obligation is ſingle.

here is a Covenant that ſtands diſtinct by itſelf, and if there be not any Covenant, then the Obligation is ſingle; *Owen* 136. *Waller's* Caſe there cited, *Raym.* 27. *Capenhurſt's* Caſe.

Regula.

It is laid down as a Rule in *Siderphin*; Obligation for Performance of Covenants in a Leaſe, if the Leaſe become void, be it what Way it will, by Releaſe, Surrender, *&c.* or by Statute Law, the Bond is void alſo. 309. *Jevans* and *Harridge.*

Defendant pays *Oyer* of the Condition, which is for Performance of Covenants in certain Indentures made between the Plaintiff, being High-Sheriff, and his Under-Sheriff, on the Part of the Under-Sheriff to be performed upon *Oyer* of the Condition. The Defendant pleads, That the Indentures between the Plaintiff and the ſaid Under-Sherriff at ſuch a Day and Place, and one Part of them under Seal of the Plaintiff, the Defendant brought into Court, which is entered in *hæc verba*: And further, the Defendant pleads, there is not any Covenant contained in the ſaid Indenture on the Part of the Under-Sheriff to be performed. *Et hoc, &c.* the Plaintiff prays *Oyer* of the ſaid Indenture, by the Defendant brought into Court, which is entered in *hæc verba*; by it, it appeared there are divers Covenants to be performed by the Under-Sheriff, and upon *Oyer* of the ſaid Indenture, the Plaintiff demurs. *Per Cur,* he need not in this Caſe aſſign a Breach, as in caſe of an Award; for upon the *Oyer*, the Indenture is made Parcel of the Plea, and by this it appears judicially to the Court, that he had pleaded a faux Plea, and ſo the Plaintiff need not ſhew any

Where a Breach need not be aſſigned.

Matter of Fact in his Replication to maintain his Action, as in the Case of an Award, but a Demurrer was most proper for the Plaintiff, 1 *Sand.* 316. *Smith* and *Yeomans.*

When Action of Debt is brought on a Bond to perform Covenants in a Deed, and the Defendant cannot plead Covenants performed without the Deed, because the Plaintiff hath the original Deed, and perhaps the Defendant hath not a Counterpart of it: The Court used to grant Imparlances till the Plaintiff bring in the Deed, and upon Evidence, if it be proved that the other Party hath the Deed, we admit Copies to be given in Evidence; but here the Law requires, that the Deed be produced. You have your Remedy for the Deed at Law, we cannot alter the Law, nor grant Impralances, 1 *Mod.* 266.

In Debt on Bond to perform Covenants, the Deed to be produced.

Upon *Oyer* of the Condition, the Defendant pleads covenants performed generally, without shewing the Indenture I may demur to, 1 *Sid.* 425. *Tapscot*'s Case, 1 *Keb.* 127. *Walker* versus *Gibson*, &c.

Defendant pleads Covenants performed generally, without shewing the Indenture, it's demurrable, and why.

It is not sufficient to shew the Deed when the Plaintiff replies and prays *Oyer*, because the Plea of the Defendant ought to be special, if any in the Covenants are in the Negative; and it appears not to the Court whether the Covenants are Negative or Affirmative, until the Deed be shewed. This has been *vexata Questio*, who should set it forth. And in case the Party who would plead the Deed had it not, he ought to move the Court, and the Court will order that he shall have the Deed, or a Copy of it, *Sid.* 1. 50, 97. *Lewis* against *Ball*, and *p.* 425. *Tapscot*'s Case,

If the Party who would plead the Deed had it not, the Court will order he shall have the Deed or Copy.

Oyer.

so is 1 *Keb.* 104. The Defendant cannot now pray *Oyer* as heretofore, but must plead to the Indenture, and produce it to the Court.

The Defendant to deliver a Copy of the Covenants to the Plaintiff.

The Court on an Affidavit by the Attorney, that the Bonds are for the Performance of Covenants, will order the Defendant to deliver a Copy of the Covenants to the Plaintiff, that he may reply there are none broken; but not else, but by Consent; 1 *Keb.* 653. *Paschall* and *Jekell.*

The Defendant demands *Oyer* of the Condition, *& ei Legitur*, which was to perform Covenants. The Plaintiff demurs generally, because the Defendant saith not *profert hic in Curia* the Indenture; for as the Plaintiff *profert hic in Curia* the Obligation on which he declares, so the Defendant ought to *proferri in Curia* the Indenture which he pleads; for otherwise he may recite it in Pleading, and the Plaintiff may not have Answer or Remedy. This is added by *Stat.* 27 *El.* being Matter of Form, otherwise had it been upon a special Demurrer. The Entry upon the Roll always supposeth it to be brought into the Court by the Defendant, and the Court may compel the Plaintiff to give a Copy to the Defendant, if he swear he never had any, or that he hath lost it, 1 *Sid.* 208. 1 *Sand. p.* 8. 2 *Keb.* 102. *Jevans* and *Harridge*: But it is mentioned to be *Coke*'s Opinion in 1 *Rol. Rep. Duport* and *Wildgoose*'s Case. One may take Advantage, if he saith not when he pleads the Indenture, *hic in Curia prolat'* of it upon Demurrer general, without shewing Cause, for it is Matter of Substance.

Court may compel the Plaintiff to give a Copy of the Indenture to the Defendant.

Note: In Debt for Performance of Covenants, they must be set out in *Latin*, *Allen, p.* 87.

The

The Defendant pleads, it was on Condition to perform Covenants *hic in Curia prolat'*, and in Truth the Deed was not indented. The Plaintiff had Judgment, 5 *Rep.* 20. *b. Stiles's* Caſe, *Cr. El.* 472. *meſme* Caſe.

If an Obligation to perform Covenants becomes forfeit, hanging the Action, this ſhall not make the Action good; but Obligation with Condition for Payment of Money becomes payable pending the Action, this has made the Action good, *Sid.* 308. in *Champion* and *Skipweth's* Caſe. Diverſity between Obligation to perform Covenants, and to pay Money.

A Duty which is not naturally a Debt, but by Circumſtance only a Debt upon a Bond for Performance of Covenants, or to ſave harmleſs, may be aſſigned over to the King for a Debt; but a *Scire fac* ſhall iſſue forth, to know if the Party hath any Thing to plead againſt ſuch Aſſignment. 2 *Leon.* 55. *Beaumont's* Caſe, tho' 4 *Leon. contra*, *Vid. hic ſupra.* Bond for Performance of Covenants may be aſſigned to the King for a Debt.

If a Man be bound to perform Covenants, and one Covenant is to pay Legacies, there he need not to pay them without a Demand: *Aliter*, where one is expreſly bound to pay ſuch Legacies, 2 *Leon.* 114. Demand Legacies.

Condition for Performance of Covenants, whereof ſome are void by Common Law, yet it ſhall ſtand good for the reſt agreeable to Law; but where any are void by Statute Law, all is void. If a Sheriff on *Stat.* 23 *H.* 6. will take a Bond for a Point againſt that Law, and alſo for a due Debt, the whole Bond is void, for the Letter of the Statute is ſo, for a Statute is a ſtrict Law; but the CommonLaw doth divide according to common Reaſon, and having made that void that is againſt Law, lets the reſt ſtand, as If ſome of the Covenants are void at Common Law, yet the Bond to ſtand good for the reſt. If ſome are void by Statute Law, all is void.

is 14 *H.* 8. *fo.* 15. *Hob.* 14. Sir *Daniel Norton* verſus *Simms.*

So it was adjudged in *Lee* and *Coleſhill's* Caſe, *Crok. Eliz.* 529. A Condition for Performance of Covenants; one is againſt the Statute for buying of Offices, the other is a good Covenant, and not relating to that; the Bond is void in all, for the Statute ſaith, the Bond to that Purpoſe ſhall be void, and it cannot be void to this Intent and good to another. And it hath been adjudged, if a Perſon makes a Leaſe which is void by the Statute for Non-reſidence, and there is an Obligation for Performance of Covenants; altho' there be ſome Covenants there in which do not concern the Leaſe, yet the Bond is entirely void, otherwiſe the Meaning of the Statute ſhould be defrauded by putting in a lawful Covenant within the Indenture, *Vid. Pract. Reg.* 121.

CHAP.

CHAP. LII.

Bonds for Performance of Covenants. Pleading.

Where the Covenants are in the Affirmative or Negative, or in the Disjunctive. Where Performance muſt be ſhewn particularly.

CONdition to perform all Covenants compriſed in ſuch an Indenture, the Defendant pleads he had performed all Covenants, without ſhewing how. *Per Cur'*, as to all the Covenants which are to be performed in the Affirmative, the Plea is good; but a Negative Covenant muſt be anſwered in the Negative, and where the Plaintiff is to be a Party to the Performance; as if I am bound to enfeoff you of Two Acres in *D.* which you ſhall aſſign, here I muſt ſhew how: Alſo where Words are in the Disjunctive, it ought to be ſhewed ſpecially. *16 H. 7. 11. a.*

If I am bound to perform Covenants, and the Covenants are in the Affirmative, if the Performance of them be by Matter of Fact, I may recite the Condition, and plead generally I have performed all the Covenants, and ſhall not ſhew eſpecially the Performance of them: As if I am bound to enfeoff the Obligee of, *&c.* and alſo, that I ſhall give to him an Horſe. In Debt brought upon the Obligation, I ſhall ſhew the Condition, and ſay, *Per implevi omnes conventiones*, and ſhall not ſhew the eſpecial Matter of the Performance, as that I gave him an Horſe

at ſuch a Place, *&c.* but if the Condition be in the Affirmative, and the Performance of it may be tried by Matter of Record; as if I am bound, I ſhall be nonſuited in ſuch an Action, there I ſhall ſhew the Performance of this eſpecially; but if the Condition be in the Negative, as that I ſhall not go to *London* before ſuch a Day, I muſt anſwer to this in the Negative. 13 *H.* 7. 19. *b.* 10 *H.* 7. 12. *b.*

If the Defendant pleads generally Performance of Covenants, where ſome are in the Negative, and ſome in the Affirmative, and the Plaintiff doth demur generally upon it, without ſhewing Cauſe of Demurrer, Judgment ſhall be given according to the Truth of the Caſe; for that Default of Pleading is but Matter of Form, and is aided *per Stat.* 27 *Eliz.* except the Plaintiff for Cauſe ſheweth ſome are in the Negative, and ſome in the Affirmative; but if any of the Covenants be in the Disjunctive, ſo as it is in the Election of the Covenantor to do the one or the other, then it ought to be ſpecially pleaded, and the Performance of it, for otherwiſe the Court cannot know what Part hath been performed. 1 *Leo.* 311. *Oglethorpe* and *Hide.*

It is agreed *per Cur'*, in *Mint* and *Bethell's* Caſe, when the Matters to be pleaded tend to Infiniteneſs and Multiplicity, whereby the Rolls ſhould be incumbred with the length thereof, the Law allows of a general Pleading in the Affirmative, and allows of the Rule, That he who pleads in the Affirmative, ſhall alledge Performance of Covenants generally; and it was ſaid, it hath been reſolved by all the Juſtices of *England*, that in Debt on Obligation to perform the Covenants in an Indenture, it ſufficeth to alledge Per-

Performance of Covenants generally.

Performance generally. One covenants to deliver to the Plaintiff all the Fat and Tallow of all Beasts which he, his Servants, or Assigns, should kill or dress before such a Day. The Defendant pleaded, That upon every Request made to him, he delivered to the Plaintiff all the Fat and Tallow of all Beasts which were killed by him, his Servants, or Assigns, before the said Day, and good. *Cro. Eliz.* 749.

In Debt on Bond for Performance of Covenants; one whereof was, That the Defendant should not deliver up Possession to any but the Lessor, or such Persons as should lawfully recover. Defendant pleads, he did not deliver it, but to such Persons as lawfully recovered it. Plaintiff demurs. The Bar is pursuant to the Count, and lying not only in the Knowledge of the Defendant, but that the Plaintiff may as well have Knowledge of it. On affirmative Covenants, general pleading Performance is sufficient, and so on Negative, *per Twisden*; for it is sufficient for the Defendant to plead an Excuse, and the Plaintiff must assign a Breach to intitle himself. *Windham ad idem.* Negative Covenants may enwrap many Particulars, as to say, He did not cut down my Timber, unless for the making of Barns and Stiles, *&c.* which *Foster* agreed. Judgment *pro* Defendant. It was said in this Case, here is no Breach necessary to be assigned by the Plaintiff, the Plea being on particular Covenant, which is like a Release pleaded in Arbitrament. 1 *Keb.* 380, 413. *Nicholas* and *Pullen.*

Bar pursuant to the Count.

In Bond of Covenants the Condition is, If the Defendant and *T.* and their Assigns, perform, *&c.* and he pleads, That he and *T.* had performed, and saith not [their Assigns],

ſigns], and may be they had aſſigned it over. *Per Cur'*, it appeareth not that there is any Aſſignee, and it ſhall not be intended, except it be ſpecially ſhewed, and a Bar is good to a Common Intent. 2. The Condition was, If they perform all the Covenants, Conditions, Agreements, Articles, *&c.* and when he recited them, he ſaith not which are all the Covenants, Conditions, Agreements and Clauſes, in the Indenture, but leaves out *Articles*. *Per Cur'*, Agreements is all one with Articles; and if many Words contain one Thing in Signification, if he anſwer to them in Subſtance, it is good. *Cro. Eliz.* 255.

A Bar good to common Intent.

Debt on Bond, Condition to perform Covenants. Defendant pleads the Indenture; which was, to retorn all the Effects of Goods ſent to *Barbadoes*, and that he had performed all the Covenants: The Plaintiff replies, ſuch Goods were ſent to *Barbadoes*, whereof he had not retorned the Effects. The Defendant rejoins, that he had not any Orders to retorn the Effects of them. On Demurrer, Judgment *pro Quer'*, for this is a Departure, no Mention of Order being in the Covenants. But by *Hales*, had the Covenant been to retorn them upon Order, the Plea had been good, and in ſuch Caſe, *performavit omnia* may be taken, that he had performed all which he ought to perform, not having Order. 2 *Lev.* 97. *Wood* and *Kirkham*.

Departure.

Covenants in the Negative or Disjunctive, ought to be ſhewed ſpecially performed.

It was agreed in *Ley* and *Lutterell*'s Caſe, *Palm.* 70. when all the Covenants are in the Affirmative, and Matter of Fact, the Performance of all Covenants, without ſhewing how, ſhall be good: *Aliter*, where any are in the Negative, or Disjunctive, this ought

to be ſhewed ſpecially how performed; and when any Covenant is Matter of Record, and to be performed, although it be in the Affirmative, yet ought it to be eſpecially ſhewed how performed, as in the Caſe of a Plea of a Fine levied, becauſe the Record ſhall be tried by it ſelf, and its Credit ſhall not be examined *per le Pais*; and perhaps the Plaintiff will reply, That all Parcels contained in the Indenture are not compriſed in the Fine, or other Plea; upon which the Fine ſhall be examined, and there is another Diverſity, where the Act ought to be done by the Party, and where by a Stranger; where between the Parties, if it be in the Affirmative, general Performance is ſufficient, but if the Act be to be done by a Stranger, (as Covenant that *J. S.* and his Wife ſhall levy a Fine) this Performance ought to be ſpecially alledged; the Reaſon is, becauſe the Obligee is a Stranger to him that ought to do the Firſt Act, therefore the Obligor ought to ſhew how this Act was done by the Stranger.

So Matter of Record.

Diverſity, where the Act ought to be done by the Party, and whereby a Stranger.

Debt on Bond, to perform all Covenants contained in ſuch Indenture. In Debt on this Bond the Defendant cannot ſay, there is not ſuch Indenture but is eſtopped; one need not be ſo particular of the Breach upon a Covenant, as upon a Bond for Performance, for in a Bond for Performance of Covenants, where there is a Covenant to repair, if it be ſued, it's not ſufficient to ſay, that the Houſe is out of Repair, but you muſt ſhew how; but on a Covenant it's enough to ſay, that it was out of Repair. *Ibid.*

In Debt on Obligation, conditioned to perform Covenants, Payments and Agree-

ments

ments in Indenture of Demiſe of Lands in Poſſeſſion of *A.* for Years: Defendant on *Oyer* pleads Performance of all Covenants, Payments and Agreements, and ſo the Bond is void by the Covenant; to which the Plaintiff replied, That the Defendant had nothing in the Lands, but one *A.* To which the Defendant demurred. And *per Cur'*, this is a good Breach, notwithſtanding no actual Eviction of the Poſſeſſion is ſet forth. 2. The pleading Performance of all Payments being only in purſuance of the Covenant, and pleaded as a Defeaſance to the Obligation, doth not make the Bond void, nor can the Plaintiff take Iſſue on Payment, unleſs ſo ſpecially pleaded. 3 *Keb.* 616. *Odingley* and *England.*

A good Breach, notwithſtanding no actual Eviction of the Poſſeſſion is ſet forth.

In Debt on Bond, the Condition was to perform Covenants of Payment of Rent, and other Particulars. Defendant pleads Performance generally. Plaintiff demurs, for he ſhould have pleaded Performance to each Particular, or other Plea; and ſo wherever Particulars are ſpecified. 2 *Keb.* 362. *Brown* and *Talderly.*

Note, Action on the Caſe lies againſt an Attorney, in Nature of a Diſceit, for that the Defendant, being Attorney for *J. S.* againſt the Plaintiff, in Debt on Bond of Covenants, without any Warrant, enters an Imparlance without the Condition, whereby they could not plead Performance of Covenants; upon which, Judgment by *nihil dicit* was given. *Rol. Entr. p.* 57.

In Debt on Bond, conditioned to perform Covenants of Under-Sheriffs, Bayliffs, Part in the Negative, and Part in the Affirmative. The Defendant, as to thoſe in the Negative, plea-

pleaded negatively; and as to thoſe in the Affirmative, that he had obſerved them. To which the Plaintiff replies, That the Defendant was not aſſiſting at the Arreſt of *J. S.* To which the Defendant demurred. *Per Cur'*, The Plea is ill, without ſhewing how he had performed them, and yet the Replication is good to ſhew a Cauſe of Action, for the naughty Plea was a Trap that the Plaintiff ſhould have demurred to it, and ſo no Cauſe of Action would appear. Judgment *pro Quer'*, 2 *Keb.* 405. *Clavell* and *Gallee*.

How performed to be ſhewed.

Condition was for Performance of Covenants in a certain Indenture, whereof ſome were in the Affirmative, and ſome in the Negative: He pleaded the Indenture, and Performance of all the Covenants therein generally; and it was thereupon demurred, and without Argument adjudged for the Plaintiff. *Cro. Eliz.* 691. *Cropwell* and *Peachy*.

Where an Act is to be done according to a Covenant, he who pleads the Performance ought to plead it ſpecially; otherwiſe, where it is a Permittance, then it is as in the Negative; in which Caſe *permiſit* is a good Plea, and then it ſhall come on the Plaintiff's Part, to ſhew how the Defendant *non permiſit*. 1 *Leon.* 136. *Littleton* and *Perne*.

Diverſity between an Act to be done, and a Permittance in Pleading *Permiſit*.

Note, The Condition of a Bond for Performance of Covenants in an Indenture doth eſtop to ſay, There is no ſuch Indenture; but it doth not eſtop to ſay, There are no Covenants. 1 *Mod.* 15. *Holloway*'s Caſe. 2 *Keb.* 564. 1 *Sanders* 316. *Moor* 420. 2 *Cr.* 375. *Allen* 52.

What the Condition of a Bond for Performance of Covenants eſtops, and what not.

Condition to perform Covenants. The Defendant pleads, after the making the Bond,

Bond, and before the Writ, the Indenture was cancelled by the Plaintiff; the Plea is ill, for the Bond might be forfeited: He ought to have pleaded Performance of Covenants till ſuch a Day, which Day the Indenture was cancelled. 1 *Brownl.* 78. *Anonymus.*

Condition to perform Covenants in Indenture, bearing even Date, &c. and there is no Date.

The Condition was, to perform all Covenants compriſed within certain Indenture, bearing even Date with the Obligation (and in Truth the Obligation and Indenture were both without Date). *Per Cur'*, they ought to have averred a Date of the Obligation, and averred that the Indenture bore the ſame Date with the Obligation. *Noy p.* 21.

Upon *Oyer* of the Condition to perform Covenants, Defendant pleads, That there were not any Covenants in the Indenture. Plaintiff demurred, becauſe if there be not any Covenants, the Obligation is ſingle, and had Judgment. 1 *Lev.* 3. *Huel* and *Povey.*

What is confeſſed by Pleading. Covenants performed.

Obligation to perform Covenants. The Covenant was, If the Plaintiff pay the Defendant 100 *l.* at *Michaelmas*, that the Defendant would pay him Yearly 10 *l.* for his Life, and averred he did not pay him 10 *l.* Yearly, but did not mention the Payment of the 100 *l.* by him, which was aſſigned for Error. *Per Cur'*, It's no Error, becauſe the Defendant, by pleading Conditions performed, had confeſſed the Payment of the 100 *l.* to him by the Plaintiff. *Moor* 474. *Goodwin* and *Iſham.*

Bonds,

Bonds, with Conditions to perform Covenants generally, and what ſhall amount to a Breach or not; and in what Caſes a Breach need not be aſſigned.

If a Man let for Years, rendering Rent payable at *Michaelmas* and *Lady-Day*, on Condition, That if he doth not pay at the ſaid Feaſts, or within 14 Days after, then to re-enter; and the Leſſee binds himſelf in an Obligation with Condition to perform the Covenants and Agreements of the ſaid Leaſe. The Leſſee pays not the Rent at the Feaſt, but within the 14 Days; yet the Condition is forfeited, for that the Condition in the Leaſe is not Parcel of the Reſervation. 1 *Rol. Abr.* 431. *Middleton* and *Ratcliff*.

Condition in the Leaſe not Parcel of the Reverſion.

A Condition to perform Covenants and Agreements. One was, That the Plaintiff had covenanted with the Defendant, That it ſhould be lawful for the Defendant to cut down Wood for Fire-boot and Hedge-boot, without making Waſte, or cutting more than neceſſary. The Plaintiff aſſigns a Breach in that Covenant, (which is, in Truth, the Plaintiff's Covenant;) the Exception was, That the Condition ought but to extend unto Covenants to be performed on the Part of the Leſſee, *Sed non allocatur*, it is the Agreement of the Leſſee, though it is the Covenant of the Leſſor. 1 *Leon.* 324. *Stevenſon*'s Caſe.

Agreement of the Leſſee, and Covenant of the Leſſor.

If

If a Man leaſe a Mannor by Indenture, except ſuch a Parcel of Land, and in the Indenture there are divers Covenants to be performed on the Part of the Leſſee, and the Leſſee binds himſelf in an Obligation to perform all Covenants and Agreements contained in one Pair of Indentures, and names the ſaid Indentures, and after the Leſſee enters into the Lands excepted; this is no Breach of the Condition, for the Land excepted is not leaſed, and it is as if it had not been named. 1 *Rol. Abr.* 43. Dame *Ruſſel* and *Guſwell*. But *Plowden* 67. in *Dove* and *Manningham's* Caſe. If one make a Leaſe of a Mannor, excepting a Cloſe, rendering Rent, and the Leſſee is bound to perform all Grants, Covenants and Agreements, *Contenta, Expreſſa, aut Recitata*, in the Indentures. If he diſturb the Leſſor in the Occupation of the Cloſe excepted, he has forfeited the Obligation; for when he excepts the Cloſe, he is content with it, and that the Leſſor ſhall occupy it; and then this is the Agreement, and the ſaid Words, [*Contenta Expreſſa, aut Recitata,*] every of them go to the Exception, as well as to the Reſidue.

Entry into Land excepted, no Breach of the Condition.

The Words to perform all the Agreements, *Contenta, Expreſſa, aut Recitata*, how far it extends.

If a Breach be aſſigned after the Action brought, it is ill. Defendant demands *Oyer* of the Obligation, and it was for Performance of Covenants. Plaintiff replies, and aſſigns a Breach for Non-payment of Rent the 20th Day of *June*, 17 *Car.* and the Bill was filed *Trin.* 17 *Car.* which Term ended the 14th Day of *June*, therefore ill. *Sid.* 307. *Champion's* Caſe.

Breach aſſigned after the Action brought, ill.

Bond

Bond of Covenants to perform an Indenture of Demiſe. The Plaintiff declares, He made a Leaſe the 28th of *May* to the Defendant; and that *poſtea, Scil'* 27th of the ſame Month of *May*, the Defendant broke the Covenant. Demurrer, becauſe the Breach is ſet forth, and before the Leaſe began, and ſo no Cauſe of Action. But by *Bacon*, where the *Poſtea* and *Scil'* are repugnant, as here they are, the *Poſtea* ſhall be good to ſignify the Time of the Covenant broken, and the *Scil'* ſhall be void. *Stiles, p.* 45. *Anonymus.*

Though in Obligations (put in Suit) for Performance of Covenants, the Breach ought to be more preciſe and particular than Actions of Covenants, becauſe of the Penalty; yet if what is material, and of the Subſtance of the Covenant be alledged, it may ſuffice; as the Covenant was, That the Defendant (a Bayliff) ſhould not let at Large any Priſoner that ſhould be arreſted, without Licence of the Plaintiff, and an Under-Gaoler. The Breach was, That the Defendant had let him at Large, at *Weſtm' ſans* Licence, *&c.* but ſhews not the Place or Time of the Arreſt. *Per Cur'*, he need not, the Eſcape being the material Part of the Covenant. *Sid.* 30. *Jenkins* and *Hancock.*

If the ſubſtance of the Covenant be alledged, it may ſuffice.

If the Breach of the Condition of an Obligation be ill aſſigned, the Verdict ſhall never aid this Default. *Sanders* 2. 179. *Kirby* and *Hamaker*, cited.

Note,

Cauſe of Action muſt appear.

Note, Tho' the Action be well brought upon the Obligation, yet when it appears that the Condition was for Performance of Covenants, there can be no Cauſe of Action without ſome Covenant broken, and ſo ſhall not have Judgment, though he hath a Verdict. *Hob.* 14. Sir *Daniel Norton*'s Caſe.

FINIS.

THE

THE INDEX.

A.

Account.

Covenant and not Account *Page* 11
Covenant to Account. Defendant pleads he was robbed, and ſo could give no Account 241
To account Monthly after Requeſt, and the Requeſt was after the Day of the Month, 245
Pleaded, That he made an Account of all the Rents, but ſaith not what Sums *ibid.*
Covenant to give account of all ſuch Monies as ſhould come to his Hands 246
Covenant to ſearch and view the Accounts, 247
How Acres ſhall be accounted 211

Act.

Notwithſtanding any Act,
Any Thing to be done by the Leſſor, Nonfeaſance no Act 44

To any Acts done by him, how it ſhall refer, *Page* 199
Defendant pleads, he had good Title at the Time of the Covenant, by vertue of certain Fines from Sir *T. P.* and his Wife, and an Act of Parliament declared the Fines void; and Sir *T. P.* entered: The Covenant is broke
Diverſity between Affirmative and Negative Covenants 50, 71
If Acquittal refer to the Land or the Perſon, he muſt ſhew how 277

Actions.
Brought on Covenants 292
How often on Breach of Covenant 192
By a Party that doth not ſeal 194, 295
One Action of Covenant upon Two Reverſions 295
In what Caſes one cannot have Action of Covenant, not being Party to the Deed or not 297
Or where a Stranger to the Covenant ſhall have Action on the Caſe againſt the Covenantor 198
When the Action ſhall be brought on ſeveral Payments 297
In what Special Caſes Action of Covenant lies 300. And in what not, 304
Surviving Covenantee to bring the Action, though he hath no Benefit 326

Agreements.
Where the Word [agreed] makes a Covenant 13
What ſhall be ſaid an Agreement, and what Agreement amounts to a Covenant 30
Where it ſhall be an Agreement of the Leſſee, and the Covenant of the Leſſor 32

Where

Where a remote Agreement at the End of the Deed qualifies the former Part *Page* 43
Non performavit Agreeamentum ſuum generally, without ſhewing a particular Breach, where good 71
Covenant not to alien or aſſign 121
Not to alien but to Wife or Children. *ibid.*
Where, though there was Alienation by Licence, yet that Aſſignee cannot alien without Licence 122
Annuity, or Covenant at Election 131
Where the Words [and alſo] make Two diſtinct Sentences 240
Articles amounting to an immediate Leaſe, 29
The Clauſe [if any Strife ariſe] to be ſubmitted to Arbitrators; how to be conſtrued, 51

Aſſignment,
Where the Words [aſſign, transfer, and ſet over] amount to a Covenant, or not 37
Aſſignee ſhall have Covenant on the Words [Demiſe and Grant] 39
Where Aſſignee ſhall have Action on a Covenant in Law 42
Covenant not to aſſign a Thing in Action, 54
Aſſignment of a Choſe in Action, good in Equity 98
Where Aſſignee ſhall have Benefit of a Covenant 107
Covenant againſt the Aſſignee of Part, becauſe it runs with the Land 108
Covenant not to alien or aſſign 121
Of Aſſignee aliening without Licence 127
Leſſee aſſigns his Term, and the Leſſor his Reverſion; the Reverſioner accepts the

Rent of the Aſſignee, yet he may have Action of Covenant againſt the Firſt Leſſee *Page* 129
Aſſignment and Acceptance pleaded 147
Where the Leſſee or Aſſignee may be charged at Election 169
Where One may be Aſſignee of Covenant, and not of Eſtate 188
Defendant pleads Aſſignment before the Rent-Arrear 189
Covenant, 330. Againſt Aſſignees 333
Where againſt the Aſſignee or Leſſee at Election 344
Covenant againſt Leſſee after Aſſignment of the Term 336
—— And Acceptance 344
Againſt Aſſignee, though he be not named, 342
Againſt Aſſignee, though but Aſſignee of Parcel of the Thing demiſed 339
Aſſignee by Eſtoppel cannot have Action of Covenant 347
In what Caſes the Aſſignees ſhall be bound, though not named Apprentices 349
Covenant brought by Apprentice 286
By what Covenants bound, though under Age *ibid.*
Covenant to inſtruct, if diſcharged by the Death of the Maſter *ibid.*
Diſcharge at Seſſions pleaded 287
Covenant againſt Apprentices 288
Covenant for Aſſurance 208, 209
Time to adviſe with Councel, 209, 211, 229
What is not a reaſonable Aſſurance, 210, 285
If Warranty or other Covenants may be inſerted 211

If

If Assurance agree in Substance with the Covenants, it's good Page 214
Covenant to make further Assurance on Request 222
Covenant to make Assurance, as Councel shall advise 226
By the Advice of *J. S.* if *J. S.* devise an insufficient Security, the Covenant is discharged 228
Diversity between Assurance and reasonable Assurance 226
In Covenant to make Assurance, who to do the First Act 212
What Acts are not included in the Assurance; Obligation not, Warranty not, Deed Poll not any Assurance; in what Case 229
Usual Covenants may be put in 231
Further Assurances, at whose Costs 233
Plea, That the Plaintiff did not tender the Costs 234
Assurance to be made by Parcels, if required, 234
If any Covenant is unreasonable, to be shewed on the other side 236
A general Request to convey, how expounded 284

Averment,
In mutual Promises the Defendant need not aver Performance 76
Where, and in what Cases, Averment of Performance need to be pleaded or not, 84, 217, 229

Authority,
Grant of an Authority to act, *absq; denegatione, impetitione, restrictione, &c.* amount to a Covenant 38

Covenant, That he had good Power and lawful Authority *Page* 170

B.

Ballaſt, of a Ship, what ſhall be ſaid to be, 59
Where a Bargain and Sale inrolled doth not make a ſufficient Eſtate 212
Covenant brought by Baron and Feme 321
Againſt Baron and Feme 322

Breach.

Breach of one Covenant not to be pleaded in Bar of the other 75
Aſſignment of a Breach according to the Words of the Covenant 129
Where it's ſufficient to aſſign the Breach as general as the Covenant is 160, 259
A Covenant, where not broken, by Reaſon of Accidents 150
By Breach of Covenant in Law the Obligation is forfeited 172
In aſſigning a Breach where you muſt ſhew Eviction by a lawful Title, and why, 173
Where Eigne Title muſt be ſhewed *ibid.*
Expulſion by Execution pleaded 173
Where Covenant extends to Expulſion on Eigne Title 174
Exhibiting a Bill in *Chancery*, if a Breach or not 187
Traverſe contains more than is alledged in the Breach 193
Breach uncertainly alledged 243
Actions, how often on Breach of Covenant 292

For every Breach of Covenant a new Action, *Page* 299
Breaches, what Suits in Law ſhall be a Breach 387
Where a Suit after the Determination is a Breach of Covenant 391
Breach by Diſability 391
Where Breach muſt be aſſigned according to the Words of the Covenant 393
Breach may be aſſigned, though not directly within the Words 394
In many Caſes, Endeavour ſhall be eſteemed a Breach, though it take not full Effect, 397
In Covenant, a Man may aſſign as many Breaches as he will, and ſhall have Judgment for thoſe that are well aſſigned, 399
Et ſic, a ſufficient Averment of a Breach, 399
Where a Breach not well aſſigned by a *Clamans Titulum* 400
Covenant to build 115

Breach,
In Non-payment, *ad ſeparalia feſta* 417
Where a Breach ought to be laid in the Diſjunctive, and not in the Copulative, 402
For a Penalty a Man can aſſign but one Breach 405
A Covenant in the ſame Indenture pleaded, is a Bar of the reſt 406
A good Breach may be aſſigned, though not within the Words 409
Where the Judgment ſhall ſtand as a further Security, to anſwer Damages for a further Breach 411

[*But that,*] how expounded Page 60
Whether it makes any new Matter 93

C.

Covenant in Nature of a Condition Precedent 3
Covenant and not Caſe, Caſe and not Covenant 4
Covenant or Debt at Election 5
Covenant and not an Exception 7
Where a Covenant and a Grant alſo 7
Not a Covenant, nor a Condition, but a Declaration Explanatory 7
Covenant, and not a *Solvendum* 11
Covenant, and not Account *ibid.*
What Words will create or amount to an expreſs Covenant 12
Covenant or Warranty, according as the Eviction is 13
The Word Covenant ſometimes ſounds in Covenant, and ſometimes in Contract 15

Particular Conſtructions of *Covenants*:
I will be ready at all Times to deliver on Account, amounts to a Covenant 26
Where it is a Condition, tho' the Words found in Covenant 27
Of Covenants in Law, and the Operation thereof 36
By what Words *ibid.*
Covenant in Law ought to be fixed upon an Eſtate 38
No Covenant in Law upon Eviction of Goods 38
Covenant in Law ſhall be extended to do more than he can 39
Where an expreſs Covenant qualifies the Generality of the Covenant in Law 40, 41, 42

Where

Where an expreſs Covenant controuls an implied one Page 42, 43
Copulative Covenants 44
Where collateral Things are to be done or permitted 54
A Man ſhall be ſuppoſed by his Covenant to do what properly belongs to him.
The ſeveral Sorts of Covenants 62
Covenant conſiſting in a Contingency 64
Where a latter Covenant doth reſtrain a former 96
Covenants inherent, collateral 105, 242
Covenant to be brought upon a Deed, according to the Nature of the Covenant 129
Conſtruction of the Covenant to leave in as good Plight 150
Covenant to convey. *Vid.* Aſſurance.
Where the Execution of the Conveyance ought to precede the Payment of the Money, or not 217
Covenant to convey according to the Draught agreed, *&c.* need not to tender Wax, *&c.* 256
Where the Words [*in conſideratione inde,*] ſhall make a Condition Precedent, or not. 75
Covenants concerning Copyhold Eſtates, 270
Covenant to ſurrender, it muſt be an effectual Surrender 209, 270
By Covenant to make a Surrender upon Requeſt, not bound to make a Letter of Attorney 271
Agreement to ſurrender Copyhold Lands to the Uſe of *A.* If *A.* ſurrender into the Hands of Two Copyholders, according to the Cuſtom, be a good Performance, 271

Where the Covenantor ought to procure a Court to be held Page 272
Covenant to aſſign a Copyhold Eſtate 371
Of the Plea *Concilium non dedit Adviſamentum* 231
Cuſtom of *Briſtol, conventio ore tenus* 2
Covenant, in what Caſes doth not lie 304
Againſt whom Action of Covenant lies 308
Who ſhall have Covenant 319

D.

Declaration,
Quod cum per Indenturum Teſtatum exiſtit, good in Covenant, not in Debt for Rent 131, 376
In Covenant by Heir or Executor, how to declare 131
Defeaſance and not a Covenant 2, 8
Covenant lies not on Words of Defeaſance, or in the preſent Tenſe 306
Declaration,
Et ſic infregit Conventionem, tho' the Breach is of Three Covenants 369
Sum miſcaſt *ibid.*
Declares *adhuc,* &c. which refers to a Time after the Original, yet good
By a *Teſtatum exiſtit,* where good or not 376, 377
Per ſcriptum, and ſaith not *Sigillo ſuo ſigillat'* 377
Licet, and ſaith not *tamen* 378
Leaſe alledged by Way of Recital 379
Indenture miſtaken as to Parties 380
Poſtea & ſcilicit Repugnant 381
Demand of leſs than is due 382
Variance between the Deed and Declaration 382

In Covenant with a *Proviſo*, the Declaration good without Recital of the *Proviſo*, Page 415
Traverſe not material 416
Debito modo execut', where good Pleading, or not 114, 390, 400, 128
In expreſs Covenant to pay the Rent, there needs no Demand 132
Who to do the firſt Act by Demand 133
Indenture to pay Rent, and Bond with Condition to pay the ſaid Rent referring to the Indenture, the Leſſor muſt demand it 134
Where it is neceſſary in Covenant to alledge a Demand 255
Covenant to diſcharge, where it goes to the Land, and where to the Poſſeſſion 280
Shew how diſcharged of Incumbrances 194
Of Disjunctive Covenants, and pleading them 65
Covenants in the Copulative and in the Diſjunctive 67
Disjunctive Covenant is in Advantage of the Covenantor 69
Covenant to leave as good Mill-ſtones in the Mill as when he entered, or to give Satisfaction in Money, according to the Diſcretion of thoſe that viewed them firſt; how to be conſtrued and done 68
In Disjunctive Covenants, he ought to ſhew which of them is performed 240
What Covenants are diſtinct or not 90
Diſtinct Covenants, one in Bar to the other 94
Covenant that he was ſeiſed in Fee, and had Authority to ſell, whether ſeveral and diſtinct 94

If

If I covenant that I have a lawful Right, and that you ſhall enjoy, notwithſtanding any claiming under me; theſe are Two ſeveral Covenants, and the Firſt is general, not qualified by the Second Page 96
40 *l.* accepted in Satisfaction of Diſturbance pleaded 175
Quietly to enjoy without Diſturbance of him, *&c.* or by any other Perſon thro' his Means, Title, or Procurement, how conſtrued 174
[*For anyThing done by them*] how it extends 176
No Title ſet forth by the Diſturber, yet good after a Verdict 193
What amounts to an Eviction, Interruption, or Diſturbance 183
How far the Word [*Defend,*] exends 184
Covenant by *V.* and all claiming under him; One claims under him by Act of Parliament made after the Covenant 185
Diſturbance in Land excepted, no Breach 187
Diſturbance by *K.* not ſhewing what Title *K.* had 193
Declaration not good, becauſe he ſets not forth the Diſturber had any Right 195
Where a tortious Diſturbance ſhall be a Breach of the Condition, and where not 196
A Leaſe made by a Covenant, that the Leſſee ſhall enjoy the Land without the Let of them; one of them diſturbs the Leſſee, it's a Breach 51
Covenant not to moleſt, what Moleſtation ſhall be intended 198
[*Demiſe,*] imports a Covenant in Law 44

E.

Earneſt, where accounted Part of the Sum Page 30

Eigne Title. The Words [*vendidit, aſſignavit, tranſtulit,*] do not amount to a Covenant againſt Eigne Title 183

Enjoyment,

Difference between quiet Enjoyment during the Term, and during the Term of Twenty Years 46

Covenant for quiet Enjoyment and ſaving harmleſs, both muſt be anſwered 113

Covenant for quiet Enjoyment is intended as to the Poſſeſſion 114

Covenant for quiet Enjoyment againſt particular Perſons; he covenants as well againſt their tortious Entry as legal 177, 181, 188

Covenant for quiet Enjoyment, notwithſtanding any Act done by him, how conſtrued 182

Covenant to enjoy *abſque legali Impedimento* 188

Covenant for quiet Enjoyment, *prior* Aſſignment no Breach till Entry 190

Covenant to enter into Bond to enjoy ſuch Lands, and names no Sum 196

Quod non potuit habere & gaudere, without ſhewing how 202

Suit on quiet Enjoyment after the Determination of the Term, a good Breach if well aſſigned 203

Election Disjunctive.

Election of the Covenantor or Covenantee in Disjunctive Covenants 65

Election to precede Tender *ibid.*

Entry.
Where Covenant ſhall be broken by the tortious Entry of a Stranger Page 177
Breach muſt be aſſigned on a lawful Entry or Eviction *ibid.*
Where if a Stranger enter by Tort, it's a Breach 191
Where a Man muſt ſhew that the Entry was by good Title, Eigne Title, and where need not 194
Eviction or Diſturbance, how to be pleaded 172
Covenant to ſave harmleſs from Eviction, on a Leaſe dated long before the Delivery, ſhall extend to Evictions before the Delivery 180
What amounts to Eviction, Interruption, *&c.* 183
In what Caſes an Exception and not a Covenant 2
Where an Exception is an Agreement 187
Covenant brought by Executor 319, 322
Leſſee by Eſtoppel 320
Covenant againſt Executors or Adminiſtrators 327
Executors, how to plead 330
Covenant that the Executors of *A.* ſhall pay to *B.* 20 *l.* not naming himſelf, no Covenant lies 331

F.

Covenant that he is ſeiſed in Fee 258
Covenant that he is ſeiſed in Fee according to the Indenture by which he purchaſed, the Covenant is abſolute 259

Covenant that the Defendant is lawfully ſeiſed in Fee, is intended as to the Title 260
What amounts to a Covenant to levy a Fine 32
If one be bound to levy a Fine of Land generally, he is not bound thereby to go before Commiſſioners by *Dedimus* 214, 238
Who to ſue out the Writ of Covenant 236
Diverſity between making a reaſonable Aſſurance, and a ſpecial Covenant to acknowledge a Fine 239
Covenant on *Conceſſit* in a Fine of a Term againſt a Feme Covert 300, 308

G.

Covenant and a *Grant* alſo 7
Where the Word *Grant* ſhall make a Covenant 151
Where a Covenant ſhall amount to a *Grant* 26, 33

H.

Where the *Heir* ſhall have Covenant 107, 108, 193, 320, 323, 328, 329

I.

In what Caſe Infant ſhall be bound by his Covenant, or not 273
Vide Apprentice.
Collateral Covenants not to bind Infants, 290
Joint or ſeveral Covenants 99

Conveniunt ſeparatim. Page 99
Diverſity, where the Words, *Et cum quolibet eorum*, make the Words joint or ſeveral, 102
Where joint Words ſhall be taken ſeverally, 103
Joint Intereſt 104
Covenant between them *& quemlibet eorum*, ibid.
Covenants inherent 105
To free from Incumbrances 276
Informal Iſſues, Immaterial Iſſues 428
Iſſue, Trial, Verdict 444

L.

Leaſe, and not a Covenant 8
Where the Word [Covenant] will make a Leaſe 26, 37, 44
Mortgage, and not a Leaſe 35
Where Articles make an immediate Leaſe, though there is a Covenant therein that a Leaſe ſhall be made 35
[*Conceſſi*] makes a Leaſe 35
Leaſe of a Stock of Sheep, and the old ones die, and new are put in their Rooms 45
Where a good Leaſe by way of Eſtoppel, 146
Commencement of a Leaſe in Point of Intereſt, or in Point of Computation 151
In fine Termini, & ad finem Termini, the Difference 162
Indefeaſible Leaſe 196
Covenant, That the Leaſe is a good Leaſe, 260
Covenant to renew a Term 345
Leaſe by Eſtoppel 414

Liberty of Ingreſs, Egreſs and Regreſs, to a Well of Water. Breach, he muſt not ſay he was not ſeiſed in Fee of the Well, but he had not Power to grant the Liberty, *Page* 205, 207

M.

Marriage Covenants and Agreements 124
Conſtruction of the Words, 20 *l. per Annum*, ibid.
Covenant to give 20 *French* Crowns towards a Wedding Dinner; how conſtrued 125
Covenant to give as much with his Daughter *S.* as he gave with any other Daughter 126
How Miles to be computed 61
Month, how to be computed 59
Within One Month 61
Monſtres des faits, Oyer 297
Mutual Promiſes, and of Averment, 220, 73
Where not a Condition Precedent, but Reciprocal 74
In mutual Promiſes the Defendant need not aver Performance 76
Mutual Covenants, and why 83, 84
Mutual Agreement, That one ſhall build an Houſe, and the other ſhall pay 8 *l.* for the Building 81
Agreement to pay 20 *l. pro Labore* 82

N.

Covenant to find Meat, Drink and other Neceſſaries, and ſhew not what the Neceſſaries are 6

If the Covenant on one Part be Negative, and Affirmative Covenant of the other Part be *in conſideratione performationis inde*; tho' the Negative Covenant be broken, yet the Affirmative Covenant ought to be performed *Page* 7
Negative Covenants may enwrap many Particulars 72
Difference between a Negative Covenant, which is only in Affirmance of an Affirmative Covenant; and a Negative Covenant, which is an Addition to an Affirmative Covenant 71
Covenant to deliver 20 Quarter of Corn on the 29th Day of *February* next following, and that Month had but 28 Days, he is not bound to deliver it till Leap-Year comes 109
[Then next following] how to be conſtrued, 61
Debt brought for *Nominæ Pœnæ* 133
Notice, where needful or not, 127, 145, 213, 337
No Notice of a Thing to be done by a Perſon certain, who had taken upon him to do it 243
Covenant was, Notice to be given to the Teſtator; and the Declaration is, That Notice was given to the Executor, and ſo variant, *Per Cur'*, its not material 267
Notice to be given in Writing 261
Who ought to give Notice, to whom Notice ought to be given 267
General Notice, as upon a Proclamation in Court; where ſufficient 269
Where Notice need to be laid in the Declaration, or not 371
Notice, to whom 416

Not-

Notwithstanding any Act; how it refers, *Page* 91, 243, 248

O.

Of *Oyer* in the Declaration. 373
Vide *Monstre des faits.*

P.

Payment *Secundum formam & effectum Articulorum* 119
Where the Word [Paying] amounts to a Condition, or not 19, 20
Covenant, if the Plaintiff marry his Daughter, to pay him 10 *l. per Annum*, and saith not how long 49, 50
Covenants concerning Payment of Money, Place and Time 108
Acceptance before the Day 110
At another Place 111
A Condition to perform all Covenants, [Payments] on a Deed; Payments, how to be construed 61
Payment amongst Merchants 110
Covenant to pay Money on Procurement of Pardon 116
Performing Covenants and paying the Rent, no Condition 202
Covenant to give Security on Procurement of an Office, to pay so much Yearly, Security need not be given till Deputation, 204
Paying the Rent makes not the Covenant Conditional 73
Covenants Personal 105
Periculis & casu dilitatibus maris exceptis; to what it extends 44

Where Acts done, though afterwards diſſolved or reverſed, ſaves the Performance, *Page* 46
Covenant to permit 117
Non permiſit, in what Caſe a good Plea or not 117
Who ſhall be ſaid Parties to the Indenture ſo as to be charged with it, or to take Advantage of it 63
How in a Deed-Poll. *ibid.*
Where one who is Party to the Deed, though he never ſeal, may join in Action of Covenant 6
Where Remedy muſt be by Way of Covenant, not by Plea 301
Covenant to leave in good Plight 46
Covenant to render the Poſſeſſion at the End of the Term 122
Covenant, That he hath Power to ſell 260

Pleading.
Covenant lies not on a Proviſo, there being no expreſs Covenant to pay the Money 306
Where it muſt be ſhewed what Eſtate or Right he who entered into the Land had at the Time of the Entry 413
Covenant on the ſame Deed, pleadable in Debt for Rent, and why 414
Pleading of Covenants in the Disjunctive, 417, 426
Concord pleaded 418
Where Remedy, not by Plea, but by Action of Covenant 426
Pleading Affirmative Covenants, Negative Covenants *ibid.*
Negative pregnant 428
Eſtoppel 432

[*Pro*] Agreement to pay 20 *l.* for an Horſe, [*Pro*] doth not make a Condition Precedent, but it's a mutual Covenant, *Page* 80
Where a [Proviſo] abridgeth a Covenant, 22
Where [Proviſo] ſhall not make a Condition 23
Where [Proviſo] amounts to a Condition or Covenant 24
Where a [Proviſo] is a bare Covenant, and why 24, 26
Where a [Proviſo] can have no Effect as a Condition, but is by Way of Agreement, 28
Where [Proviſo] makes a Covenant and a Condition alſo 29
Premiſſes, to what it extends 276
Proof, how to be made 289

Q.

Quaternatim, to what it extends 375

R.

Reaſonable Time, what 230
Reaſonably required
Covenants Real. 105, 106, 107
Remedy on a real Covenant Four Ways, 170
Recital, where amounts to a Covenant 17
Where Recital, conſidered with the reſt of the Deed, is material, 18
Where a Recital amounts to an Agreement, 31

Rent.

Rent, and not a Sum in groſs 10

[Paying the Rent] if it imports a Condition *Page* 19
Rent paid before the Day, no Performance of the Covenant 130
Covenant as to Payment of Rent 128
Expreſs Covenant to pay the Rent at ſeveral Days, Action lies before all the Days are paſt 130
On expreſs Covenant to pay the Rent, there needs no Demand 132
No Act of the Leſſee can diſcharge Leſſee or his Executors of a Special Covenant to pay Rent 136
What will make a Suſpenſion of Rent 141
On a Bond to perform Covenants, where Demand of Rent need not be alledged, 144
Rent-ſeek, expreſly within the Word [Rents] 273
Pleading to Action of Covenant for Rent, Annuity, Yearly-Payments 135
Nil habet in Tenementis 136, 140, 141
Levied by Diſtreſs, pleaded 137, 141
Where Demand of Rent muſt be pleaded, 137
Entry and Expulſion pleaded 138, 142
Nil debet pleaded 139
Entry before the Rent-Day pleaded, *ibid.* & 141
Plea, That no Rent is behind, ill 141
Aſſignment and Acceptance pleaded 146
Covenant for Payment of Rent, where to be tried 148
Covenant quietly to enjoy from all Arrears of Rent; pleaded, That he left ſo much Money in the Hands of the Plaintiff, *eâ intentione* to pay the Arrears 180

Requeſt. To what preceding Clauſes relates Page 254
When a Thing is to be done upon Requeſt 253
Covenant to make Aſſurance on Requeſt 222
Within the Space of one Month, when he ſhall be thereunto requeſted 222
Requeſt to be made to the Perſon 223
Covenant to repair 115
Covenant to repair, extends to Houſes after built 44
Covenant for Reparation and Damages 149, 150
Reſervation and not a Covenant 9
By Grant of the Reverſion the Law transfers the Covenant of the Leſſee 106
Covenant after Repairs by the Plaintiff, he will ſuſtain, *&c.* 151
Pavement, if included in the Word Building 153
It is agreed the Leſſee ſhall keep the Houſe in good Repairs; the Leſſor putting them in good Repair, Covenant lies againſt the Leſſor upon theſe Words 154
Covenant from Time to Time, during the Term, after Three Months Warning ſufficiently to repair, and at the End of the Term to leave it ſufficiently repaired; this laſt Clauſe is diſtinct, and he ought to leave it ſufficiently repaired without Notice 154
Neceſſary Timber to be allowed by the Leſſor 156
Diſcharge of all Reparations pleaded 161

Covenant to build, unleſs reſtrained by Proclamation, and Proclamation pleaded Page 168
Covenant for Reparation, where to be tried 168
What Releaſe ſhall be a good Bar of Covenant 425

S.

Of Covenants to ſave Harmleſs 14, 60, 111, 118
Not broken by an unlawful Diſtreſs 111
Covenant to ſave harmleſs in all Things contained in an Indenture, extends not to Bond of Covenants 112
The Defendant ought to ſhew how he ſaved harmleſs 112, 114
Breach as to not ſaving harmleſs, and ſhew not Diſturbance by Tort or Title 280
Difference where Covenant is general, and where ſpecial, as to ſaving harmleſs 281
[*Suffer,*] how far it extends 184
Stat. 32 *H.* 8. *c.* 34. explain'd 318
To what Eſtates it extends 343
To what Covenant it extends. 246

T.

Covenant to pay all Taxes in Biſſhops Leaſes 54, 123
Covenant to pay Taxes, Charges, Dues, and Duties to be paid 251
Where a Term not extinct by an actual Feoffment 278
[*During the Term,*] to what it extends 131

Covenant to pay Annuity during the Reſidue of the Term, not ſaying for what Years or Term Page 131
When Tender of a Conveyance is requiſite or not 257
Covenant to leave Timber upon the Land, how to be conſtrued 53
Covenant to have convenient Timber for Building by Appointment of the Bailiff, (on Argument) 87
Covenant to be performed in convenient Time 56
[*At all Times,*] how to be expounded 56
Uſque talem feſtum, where the Feaſt-Day is excluded or not 200
Tryal, Iſſue, Verdict 443, 444.
[*Them,*] where not to be taken jointly 187
That he was ouſted by *J. S.* who claimed under the [Title] of, *&c.* and ſhews not how 193
Claiming Title, That a Stranger entered, not ſaying *habens Titulum* 185
Habens Jus, where it implies a lawful Eviction 108
Covenant that he had lawful Right and Title to let 283

V.

Verdict 445
Covenant that the Land ſhall be of ſuch Value 248
Where a Covenant for the yearly Value is a diſtinct Covenant, or not 249
Diverſity between Debt for Rent and Covenant for Rent, as to the Venue. 317
Outlawry pleaded in Bar 388

Covenant and not a Warranty, Warranty and not a Covenant. Page 3
Difference between a Leafe and an Inheritance, as to the Words of Warranty, *ibid.*
Warranty in Law not extends to Assignee, 305

FH
MVSEVM
BRITANNICVM

FINIS.